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No. _____

In The

Supreme Court of the United States

October Term, 1996

Laurie Isaac Broad, for himself and all others who are similarly situated,

Petitioners,

v.

Sealaska Corporation, Sealaska Elders' Settlement Trust, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When finding an implied preemption, is the test being applied by the Ninth Circuit in conflict with the preemption analysis being employed by the other circuits?

When finding an implied preemption, should a court first apply the narrowest test (is there point-by-point *conflict* preemption?) before resorting to a broader test (is there *field* preemption?)?

Should implied preemptions be disfavored – at least where Congress has installed an *explicit* preemption elsewhere in the same statute?

Does the Ninth Circuit err in its use of the negative pregnant in deciding that the statutory prohibition against one form of discrimination amounts to a statutory authorization for any other form of discrimination (i.e., amounts to permission to commit any form of discrimination that is not expressly prohibited by the statute)? In other words, is Judge Posner correct: "Not every silence is pregnant"?*

---

* *State of Illinois, Department of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983) (Posner, J.).

LIST OF PARTIES**

Petitioner, Claimants:	Respondent, Defendants:
Laurie Isaac Broad	Sealaska Corporation
Marsha Simonds	Sealaska Elders'
Julie Wigg	Settlement Trust
Larry Taylor, Jr.	Patrick Anderson
Marc Simpson	Charles Carlson
Rebecca Simpson	Joseph Demmert, Jr.
Alora J. Winchester	Embert Demmert
Emily Gotardo	Raymond Demmert
Barbara Crabtree	Jim Edenso
Angie Doak	Clarence Jackson, Sr.
Royann Churchill	Marlene A. Johnson
Leonard Valezquez	Albert Kookeesh
Arlene Bell Hanson	Ethel Lund
Victor Carl Davis, Jr.	Carlton Smith
	Richard Stitt, Sr.
	Ralph Strong
	Alan Williams
	Rosita Worl
	Marjorie Young

** Pursuant to Supreme Court Rule 29.6, petitioners state that Sealaska Corporation has no parent company and has no nonwholly owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Laurie Isaac Broad, and the class of shareholders whom he seeks to represent, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit that was entered in this case on 16 May 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 85 F.3d 422 (1996). The dissent is found at *id.*, 432-35. Both the majority and dissenting opinions are set out in the appendix, below. ("App.").

The order denying the petition for rehearing with suggestion for rehearing *en banc* is also included in the appendix.

The memoranda opinions of the United States District Court for the District of Alaska (H. Russell Holland, J.) have not been reported. There are two such memoranda, one dealing with statutory issues and the other addressing the constitutional issues. Both opinions are reprinted in the appendix, below.

JURISDICTION

This lawsuit was filed in a state court and later removed to federal court. It was filed in the Superior Court of the State of Alaska at Petersburg on 30 September 1992, and was removed to the District Court for the District of Alaska by a timely notice of removal that was filed on 28 October 1992.

After the parties had filed cross motions for summary judgment, the district court granted Sealaska's motion for summary judgment and dismissed the case by orders signed on 2 December 1993 (Motion for Summary Judgment) and 4 March 1994 (Fifth Amendment Issues), which were filed by the deputy clerk in Juneau on 6 December 1993 and 7 March 1994, respectively. A final judgment of dismissal with prejudice was entered on 14 March 1994, and on 17 March 1994 an appeal was noted to the Court of Appeals for the Ninth Circuit.

After oral argument in Anchorage on 7 August 1995, the Court of Appeals affirmed the district court's decision in an opinion issued on 16 May 1996. One judge, Judge Andrew Kleinfeld of Fairbanks, Alaska, dissented.

By order dated 11 July 1996, two members of the panel voted to deny the petition for rehearing and to reject the suggestion for rehearing *en banc*. Judge Kleinfeld would have granted the petition for rehearing and accepted the suggestion for rehearing *en banc*. No vote was taken on the suggestion for rehearing *en banc*. The mandate was issued on 19 July 1996.

Petitioner submitted a timely application to extend the time for filing this petition for writ of certiorari, and the application was granted by order of Circuit Justice O'Connor on 2 October 1996. That action extended the deadline for filing this petition to and including 8 November 1996, the date upon which it is being filed.

The jurisdiction of the Supreme Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes principally involved in this case are parts of the Alaska Native Claims Settlement Act [ANCSA]: ANCSA § 7(h)(1)(A) [43 U.S.C. § 1606(h)(1)(A)] Settlement Stock of Regional Corporation; *and* ANCSA § 39 [43 U.S.C. § 1629e] – Settlement Trust Option.

> 43 U.S.C. § 1606(h)(1) RIGHTS AND RESTRICTIONS. –
>
> (A) *Except as otherwise expressly provided* in this Act, Settlement Common Stock of a Regional Corporation shall –
>
> (i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;
>
> (ii) permit the holder to receive dividends or other distributions from the corporation; and
>
> (iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

(emphasis added). In explaining why there is no conflict between state and federal law (and thus no need for a preemption analysis) the dissenting opinion of Judge Kleinfeld relied in part upon an Alaska statute, AS 10.06.960(f). The text of all three statutes is set out in the appendix, below.

STATEMENT OF THE CASE

This is a case about corporate discrimination in the payment of dividends: Sealaska Corporation pays extra dividends to some shares but not to others of the same class of stock.[1] Only shareholders over the age of 65 years are paid the extra dividend of $2,000.

No court has ever approved a discriminatory dividend. Centuries of corporate law require that a corporation pay its dividends in a uniform and pro rata manner to all shares of the same class of stock. But the majority opinion has approved a discriminatory dividend – and opened the door to a tidal wave of corporate discrimination – doing so on the most slender reed: an *implied preemption* of a monolithic rule of state law by a weak, amorphous federal statute.

The majority resorted to broad field preemption analysis for its finding of an implicit preemption – even though other parts of the same statute contain clear and *explicit* preemptions of the same body of state corporate law.

---

[1] When a corporation makes distributions and pays dividends to shareholders, it must do so on a pro rata basis and without discrimination. Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF.L.REV. 1072, 1076-78 (1983) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference."). *See also*, FLETCHER, 11 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5352 (1995 rev'd vol.); CLARK, CORPORATE LAW, § 1.2, 13 (1986); HENN AND ALEXANDER, LAWS OF CORPORATIONS, § 324 (3d ed. 1983); 18B AMJUR2D, *Corporations*, § 1220 (1985).

The majority found a negative pregnant in the federal statute's prohibition against corporate discrimination in favor of management. So it discarded the state law rule and instead allowed discrimination in favor of some (non-management) shares to the detriment of other shares of the same class of stock. This negative pregnant relies upon one of the most criticized of statutory "maxims," *expressio unius est exclusio alterius.*

The majority opinion ignored the recent pronouncements of this Court on two topics that are dispositive here. *First,* this Court has declined to find an implied preemption where an alternative construction will avoid it. *Second,* this Court has rejected the *exclusio unius* rule and its negative pregnant corollary; instead it has interpreted statutes by looking to the entire law, to its objects and to its underlying policy.

The dissenting opinion (authored by Alaska's sole member of the Ninth Circuit) explains why this case is so important to Alaska. When Congress adopted the Alaska Native Claims Settlement Act [ANCSA], it appropriated almost a billion dollars and 44 million acres of land to all of Alaska's natives to be shared on a uniform basis. ANCSA is the quintessential expression of the pro rata sharing of a community asset. The statute is full of safeguards that require equal treatment of all Natives and that prevent the sort of selfish redistribution of the settlement proceeds that are at issue in this case.

This case is of great importance to the State of Alaska and to its Native peoples. More than 200 Alaska Native

corporations will be affected by this case. These corporations have received almost one billion dollars of federal money and title to an area the size of Missouri and Kentucky combined.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS – THEY ARE SPLIT ON PREEMPTION ANALYSIS

(A) In Broad v. Sealaska Corp. and in other decisions, the Ninth Circuit resorts to overly broad field preemption when more narrow conflict preemption would suffice.

In analyzing preemption questions, federal courts overlay a three-pronged template on the area in which federal and state law allegedly collide. The first prong tells the court to search out an express preemption provision in the federal enactment. Finding no express preemption provision, a federal court then examines the record for implied preemption. In turn, implied preemption has two prongs: field preemption, in which Congress can be said to have occupied the field, and narrower conflict preemption, in which the proponent demonstrates that compliance with both the federal enactment and state statutory or common law is impossible. *See e.g., Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996) (three types of preemption exist).

Here in the instant case, the Ninth Circuit majority ostensibly found conflict preemption but rendered a decision that, by permitting all forms of discrimination among shareholders, constitutes field preemption. Thus, Judge Hall found that the Settlement Trust provision's express prohibition of utilization of a trust to favor corporate officers or directors usurps state law, thus by its further silence permitting all other forms of discrimination among shareholders. *See* 95 F.3d 426. *But see id*, at 433 (Kleinfeld, J., dissenting) (Congress may have "felt that

for other risks [of discrimination] state law protections were adequate"; "The provision prohibits one kind of discrimination, and leaves it to other federal and state laws to prohibit others.").

By overbroad use of the maxim *expressio unius est exclusio alterius*, the majority found that Congress had preempted state law from a role in policing discrimination among shareholders. The dissent recognizes this magic trick for what it is: field preemption masquerading as conflict preemption. *See id.* at 432 (if federal and state laws policing discrimination are read in harmony, "[t]hat means that there can be no preemption of the field."). *Cf.* The majority opinion at 426 ("When federal and state law actually conflict, the state law is preempted").

The consequence of the majority's holding is that "[v]irtually any transfer of corporate assets," dissent at 433, even the most discriminatory, can take place so long as officers and directors are not favored and a corporate resolution states that the discriminatory action "promotes the . . . welfare of its beneficiaries" or "preserves the heritage and culture of Natives." *Id.*

(B) In other decisions, the Ninth Circuit also has engaged in broad field preemption analysis when narrower, point-on-point conflict preemption analysis would suffice.

For example, in *Chamber of Commerce of U. S. v. Brandon*, 64 F.3d 497 (9th Cir. 1995), the Court struck down a California county's prevailing wage ordinance. The court did not first engage in any conflict preemption analysis, finding broad field preemption by concluding that such

ordinances are "incompatible with the goals of NLRA" (National Labor Relations Act).

(C) Other courts of appeal correctly examine claims of preemption point by point, first using conflict rather than field preemption when the more delicate tool is an adequate means of resolving the issue before them.

Exemplary is the Sixth Circuit. For example, in *Downhour v. Somani*, 85 F.3d 261, 265 (6th Cir. 1996), the court analyzed whether Medicare preempts a state enactment regulating the billing practices of physicians. The court first noted that "[t]here has traditionally been a presumption against federal preemption of state law" and that "if the subject matter of the state statute is one within the state's traditional powers," as is regulation of a corporation's internal affairs, "the party arguing federal preemption must show that preemption was the 'clear and manifest purpose of Congress.' " With this as the correct lodestar, and engaging in careful actual conflict analysis, the court found no preemption.

Similar recent cases include *Gustafson, supra* (6th Cir. 1996) (holding that although the Federal Aviation Act may preempt regulation of navigable airspace, the act does not preempt regulation of landing sites – local authority could regulate seaplane landings), and *Interstate Towing v. City of Cincinnati*, 6 F.3d 1154, 1157-59 (6th Cir. 1993) (provision of the Motor Carrier Safety Act did not preempt city ordinance requiring licensure of tow trucks, first engaging in conflict and then field preemption analysis).

And the First Circuit also has employed a more disciplined approach to preemption analysis than used by the Ninth Circuit. Writing for the First Circuit, Justice Breyer explains:

> Pre-emption law cautions us against finding that a congressional act pre-empts a state law through silence. The negative presumption is even stronger when the state law at issue creates a remedy unavailable under federal law. And it is virtually conclusive when Congress, in the very statute at issue, *explicitly* pre-empts *other* state law remedies but not the remedy at issue.

Schafer v. American Cyanamid Co., 20 F.3d 1, 6-7 (1st Cir. 1994) (Breyer, C.J.) (emphasis in the original; citations to five U.S. Supreme Court cases omitted); *see also, Greenwood Trust Co. v. Commonwealth of Mass* , 971 F.2d 818, 823 (1st Cir. 1992) ("In recent days, the High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption."). Had the Ninth Circuit employed such discipline in developing its own preemption doctrine, it would have noted that *Broad v. Sealaska* involves a statute that is full of explicit preemptions of Alaska law – and thus the majority would not have strained to "find that ANCSA implicitly preempts state law." 85 F.3d at 426.

The dichotomy between groups of courts of appeals is illustrated by their recent treatment of the question of whether the Medical Device Amendments (MDA) to the Federal Food and Drug Act preempt state law product

liability, design negligence, negligence, implied warranty and similar claims. The Third and Seventh Circuits apply broad field preemption analysis, holding that the MDA has occupied the field. *See, e.g., Mitchell v. Collogen Corp.*, 67 F.3d 1268 (7th Cir. 1995) (MDA preempts state claims concerning Zyderm substance used to eliminate skin wrinkles); *Michael v. Shirley, Inc.*, 46 F.3d 1316 (3rd Cir. 1995) (MDA preempts claims about defective artificial heart valve with the exception of express warranty claim peculiar to the case sub judice).

By contrast, the Fifth, Sixth and Eighth Circuits apply allegation-by-allegation conflict preemption analysis in MDA cases. These courts find that some state law claims may coexist with MDA while others may not. *See, e.g., Jacobs v. E.I. DuPont Nemours & Co.*, 67 F.3d 1219 (6th Cir. 1995) (MDA does not preempt claims against raw materials manufacturer); *Feldt v. Mentor Corp.*, 61 F. 3d 431 (5th Cir. 1995) (some claims concerning faulty implant device survive conflict preemption analysis while others do not); *National Bank of Commerce v. Kimberly Clark-Corp.* 38 F.3d 988 (8th Cir. 1994) (toxic shock syndrome state law case not preempted by the MDA).

Indeed, with regard to faulty heart pacemaker claims against the same defendant, two circuits reach the opposite result. *Compare Lohr v. Medtronic, Inc.*, 56 F.3d 1335 (11th Cir. 1995) (MDA does not preempt all state law claims), *with Mendes v. Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994) (MDA occupies field).

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

(A) By instructing lower federal courts first to attempt conflict preemption analysis rather than broad field preemption, this Court will insure that lower federal courts will find only the limited preemption that is necessary to the outcome in cases being adjudicated.

Indeed, this Court could make express a principle that – as in finding state and city statutes or ordinances unconstitutional, and in preemption cases as well – lower federal courts must rest their preemption decisions on the narrowest grounds possible. This Court has come close to saying so on several occasions. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963) (requiring "actual conflict with the law of the State"); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978) (avoiding preemption by choice of other grounds). Prof. Tribe's comment on the latter noted "the basic teaching of the *Atlantic Richfield* decision is that state pressure to act in derogation of a federal statutory scheme is not to be inferred lightly." TRIBE, AMERICAN CONSTITUTIONAL LAW, 487 (2nd ed. 1988).[2]

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[2] Other such cases include: *New York Blue Cross v. Travelers Ins.*, 514 U.S. ___, 131 L.Ed.2d 695, 115 S.Ct. ___ (1995); *Wisconsin Public Intervenor v. Mortier,* 115 L.Ed.2d 532, 111 S.Ct. 2476 (1991); *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 95 L.Ed.2d 67, 107 S.Ct. 1637 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 576 L.Ed.2d 91, 98 S.Ct. 2207

Resort to the expansive field preemption doctrine is not compatible with the underlying constitutional doctrine and the nature of federalism. One commentator notes "the doctrine of field preemption is inconsistent with modern federalism and its presumption that states retain concurrent powers." Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORN.L.REV. 767, 812 (1994).

In the instant case, Congress provided that Alaska Native Corporations could favor elder shareholders by formally amending articles of incorporation and issuing to those shareholders "elder preference stock." *See, e.g.* 85 F.3d at 434 (Kleinfeld, J., dissenting) (describing ANCSA § 7(g)(1), 43 U.S.C. § 1606(g)(1). *See also* § 1606(g)(2).

This provision also conflicts with both the statutory and common law of corporations that mandate equal treatment of all shares of the same class of stock, especially in the matter of dividends and distributions. But the provision, and the narrow preemption inherent therein, have the virtue of repealing the normal anti-discrimination rule only to the narrowest extent possible. In contrast, the Ninth Circuit majority opinion allows a broad, open ended repeal of the anti-discrimination rule, so long as corporate officers and directors are not the sole beneficiaries of the discrimination.

(1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 576 L.Ed.2d 91, 98 S.Ct. 2207 (1978).

(B) This Court should require a first resort to conflict preemption analysis, coupled with a careful analysis of the structure of federal statutory enactments, to aid federal courts in deciding cases on the narrowest preemption grounds possible.

Reasons for such a rule are found right here in the instant case. This Court has directed courts to find evidence of preemptive intent by Congress in the "text and structure of the statute at issue." *CSX Transportation v. Easterwood*, 507 U.S. ___, 123 L.Ed. 387, 396 (1993). ANCSA provides in section 7(h)(1)(A) that "Except as otherwise expressly provided in this Act, Settlement Common Stock of a regional Corporation shall . . . permit the holder to receive dividends or other distributions, . . . and (iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State." 43 U.S.C. § 1606(h)(1)(A). In its finding of overly broad, de facto field preemption, the Ninth Circuit majority ignored the structure of the statute. Section 7(g)(2), the provision for elder preference stock, is the provision "otherwise expressly provided" for which section 7(h)(1)(A) calls. Careful examination of the structure of the statute results in the narrowest preemption needed. By contrast, the open-ended settlement trust provision used by Sealaska Corp. cannot be said to be the "express provision otherwise" needed to circumvent the normal state law anti-discrimination principle. The majority's holding would permit possible bizarre and extreme forms of discrimination. There is no limiting principle. *See. e.g.*, 85 F.3d at 434 (Kleinfeld, J, dissenting) (expressing doubt

that future judicial review will prevent "egregious violations of the settlement trust option" or "bizarre transfers" permitted by the majority's open-ended preemption finding).

(C) This Court should grant review to explain when preemption analysis is required.

As Judge Kleinfeld explained in his dissent, there is no basis for a preemption analysis in *Broad v. Sealaska* because there is not, and could not be any conflict between federal and state law: "The state law says that a Native corporation can do anything ANCSA permits. AS 10.06.960(f). That means there can be nothing which ANCSA permits but state law prohibits, so there can be no conflicting state law to preempt. . . . If federal law permits the particular discriminatory cash transfer through the settlement trust, state law does too, and if not, not." 85 F.3d at 432 (Kleinfeld, J. dissenting). So the majority's casual resort to a preemption analysis was not based on need or sound doctrine.

Preemption analysis should not be used where there is no conflict between state and federal law. This instant case provides an example of why the lower courts need instruction on (1) when they may resort to preemption analysis and when they may not, and (2) when they may rely upon broad statutory language (such as the statutory purpose clause) to find a preemption that is not otherwise explicitly set out in the text.

III. IMPLIED PREEMPTION ANALYSIS IS AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT

This Court has a grand tradition of granting review in cases that are of special importance to Alaska. *Alaska v. Arctic Maid*, 366 U.S. 199, 201-02, 6 L.Ed.2d 227, 81 S.Ct. 929 (1961) ("The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska."). Other cases of the genre include: *Territory of Alaska v. American Can Company*, 358 U.S. 224 (1959) (certiorari "granted in view of the fiscal importance of the question to Alaska"), and *Zobel v. Williams*, 457 U.S. 55 (1982) (striking down statewide dividend distributions that were based upon length of residency in Alaska).

The dissenting opinion recognized what havoc the majority's opinion could wreak among the Native peoples of Alaska: "Virtually any transfer of corporate assets could be provided for in a resolution which, in its preamble, said that the transfer was to 'promote the . . . welfare of its beneficiaries,' . . . [T]he majority holding implies that Congress meant to permit some bizarre transfers of Native corporation assets." 85 F.3d at 433-34. Judge Kleinfeld, himself a former U.S. District Court judge in Alaska, went on to explain how the politics of the Native community would turn the decision upon Alaska's Natives, 85 F.3d at 434, and he concluded: "I believe Congress left in place more of the state law protection generally applicable to corporate shareholders than the majority does." 85 F.3d at 435.

IV. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION WHEN THE DEFENSE OF AN IMPLIED PREEMPTION IS RAISED TO REMOVE A CASE FROM STATE COURT

This case started in an Alaska State court as a purely Alaska case. The complaint alleged Sealaska had breached its shareholder contract by paying dividends in violation of Alaska corporations statutes and in violation of the Alaska common law of corporations.

Sealaska removed the case on the reasoning that the federal statute had preempted the corporations law of Alaska. Indeed, the majority opinion found an implicit preemption of Alaska law. *Broad v. Sealaska,* 85 F.3d 422, 426 ("we find that ANCSA implicitly preempts state law").

Implicit or explicit, neither form of preemption asserted by a defendant is sufficient to support removal from a state court. *Caterpillar Tractor v. Williamson,* 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). This Court should summarily reverse (or vacate) the decision of the Court of Appeals, and remand this case for dismissal in federal court accompanied by remand to State court. Supreme Court Rule 16.1.

CONCLUSION

In the alternative, this Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court.

Respectfully submitted this 8th day of November in 1996 at Petersburg, Alaska.

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURIE ISAAC BROAD, For Himself
and all Others Who are Similarly Situated,

Plaintiffs-Appellants,

v.

SEALASKA CORPORATION;
SEALASKA ELDERS' SETTLEMENT TRUST;
PATRICK ANDERSON; CHARLES CARLSON;
JOSEPH DEMMERT, JR., et al.,

Defendants-Appellees.

Case No. 94-35310
D.C. No. CV-93-00009-HRH

OPINION

Appeal from the United States District Court for the District of Alaska

H. Russel Holland, District Judge, Presiding

Argued and Submitted August 7, 1995 – Anchorage, Alaska

Filed May 16, 1996

Before: Cynthia Holcomb Hall, Charles Wiggins and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Hall; Dissent by Judge Kleinfeld

COUNSEL

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for the defendants-appellees.

Bruce N. Edwards and Michael R. Sorenson,
Sorensen & Edwards, Seattle, Washington,
for the amicus.

OPINION by Judge Hall; DISSENT by Judge Kleinfeld

Cynthia Holcomb Hall, Circuit Judge:

Sealaska Corporation, a Native regional corporation organized under the Alaska Native Claims Settlement Act (ANCSA), established a "settlement trust" as authorized in an amendment to ANCSA. This trust, titled the Elders' Settlement Trust (EST), provides a one time $2000 payment to each Sealaska shareholder who reaches sixty-five years of age. The plaintiffs, who are shareholders of Sealaska under age sixty five, filed a class action complaint in Alaska state court claiming that creation of the settlement trust violated state corporations law and the provisions of ANCSA. Sealaska removed to federal district court and the parties stipulated to deferring the request for class certification.

The plaintiffs appeal from the district court's order granting summary judgment in favor of Sealaska on all claims. The district court had jurisdiction under 28 U.S.C.

§ 1441(a) and this Court has jurisdiction under 28 U.S.C. § 1291. We review a district court's grant of summary judgment de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). We affirm.

I

Congress enacted ANCSA, 43 U.S.C. § 1601 et seq., in 1971 "to achieve a fair and just settlement of all aboriginal land [in Alaska] . . . with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601 note (Supp. 1995) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987). To accomplish this goal, ANCSA created regional corporations to hold and manage the Native land settlements. Congress amended ANCSA in 1987 to ensure the continuing success of the Native corporations. The amendments included a provision permitting a corporation to create a "settlement trust," a vehicle into which a corporation could transfer assets that were to be used for the health, education, and welfare of the trust beneficiaries. Assets held in these trusts enjoy protection from the corporation's creditors.

Sealaska, which is the Native Corporation for the Southeast Panhandle of Alaska, saw the settlement trust as a means to recognize the contributions of its elder shareholders and to assist them financially. The board of directors adopted a resolution to establish the EST, a trust that would be funded with corporate assets, and that would distribute $20 per share to shareholders aged sixty-five or older.

The board sent to all shareholders a proxy statement for the 1991 shareholder meeting and a description of the proposal, both of which included information about the benefits and disadvantages of the EST. The resolution received an affirmative vote from 50.7 percent of all outstanding shares, and thereby passed. The board appointed trustees and authorized the President and CEO to prepare the trust document. As of December 10, 1991, the trust has been operating according to the terms of the resolution.

In September 1992 the plaintiffs filed a class action suit in the Alaska Superior Court claiming that the cash disbursements paid out through the trust constitute a constructive dividend. They assert that this dividend is an illegal distribution because it discriminates between Sealaska shares of the same class.

Sealaska removed the case to federal court, and the parties filed cross-motions for summary judgment. In their answer to Sealaska's motion, the plaintiffs raised several additional claims. First, they argued that the proxy materials Sealaska supplied to its shareholders did not comply with applicable law because the information given was misleading and omitted material facts. Second, they argued that nonvoting shareholders should have been allowed to vote on the establishment of the EST. Finally, they claimed that the EST, under authority of federal law, takes property from the shareholders without just compensation, and thus violates their rights under the Fifth Amendment of the United States Constitution.

The district court issued several orders, which, taken together, entered judgment in favor of Sealaska and

against the plaintiffs on all claims. The plaintiffs appealed asserting an additional claim under the Due Process Clause of the Fifth Amendment. We affirm the district court's judgment on all claims, and dismiss the Due Process claim because it is not properly before us.

II

The plaintiffs' original complaint contended that the EST's disbursement of funds to elder shareholders is illegal as a discriminatory distribution under Alaska corporations law. Sealaska countered that the settlement trust provisions of ANCSA preempt state law in this respect and, therefore, the EST is a valid settlement trust authorized by ANCSA. We affirm the district court's holding that ANCSA displaces contrary state law with respect to settlement trusts, and that the EST is proper under ANCSA.

Under the Alaska Corporations Code a corporation must give equal treatment to all shares of the same class and must make its distributions without discrimination. ALASKA STAT. § 10.06.305(b). Both parties agree that the EST discriminates against shareholders who have not yet reached age sixty-five. Therefore, if the EST distributions are treated as shareholder dividends, then the payments made through the trust would violate Alaska state law and would be illegal unless authorized by ANCSA.

The district court correctly concluded that ANCSA's provisions *explicitly* preempted state law with respect to corporate resolutions that establish settlement trusts. But the relevant inquiry is not whose law governs the establishment of the trust, but instead whether a state law that

prohibits the *actions taken by the trust* is preempted by federal law. Preemption of state law regarding trust distributions is not explicitly covered by the ANCSA settlement trust provisions. Nevertheless, we find that ANCSA implicitly preempts state law in this respect.

Congress provided that conveyance of assets into settlement trusts must be carried out "in accordance with the laws of the State (*except to the extent that such laws are inconsistent with [sections 1629b and 1629e of ANCSA*])." 43 U.S.C. § 1629e(a)(1)(A) (Supp. 1995) (emphasis added). Section 1629e requires that each trust be established "to promote the health, education, and welfare of its beneficiaries and to preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1). Furthermore, it limits the use of these trusts, specifically prohibiting trusts that "discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native Corporation." 43 U.S.C. § 1629e(b)(1)(C).

According to its plain language, then, ANCSA prohibits settlement trusts that discriminate in favor of corporate insiders, but does not otherwise prohibit trusts that discriminate in favor of other groups of shareholders. This statutory section suggests that ANCSA anticipates that trusts may discriminate in favor of a particular class of shareholders. As a result, a state law that prohibits discriminatory trusts conflicts with ANCSA. When federal and state laws actually conflict, the state law is preempted. See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) ("Such a conflict arises when . . . a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress.' ") (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

Additionally, the Alaska Corporations Code itself recognizes ANCSA's supremacy when conflicts arise: "a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with [the Alaska Corporations Code]." ALASKA STAT. § 10.06.960(f). Because ANCSA allows trusts that discriminate in favor of some shareholders, and the Alaska Corporations Code proscribes such actions, federal and state law conflict. In such cases, the federal law prevails. Thus, Alaska corporations law abdicates in favor of ANCSA with respect to settlement trust distributions.

Plaintiffs further contend that even if ANCSA does govern establishment of the EST, the EST is a misuse of the settlement trust option for two reasons: (1) because Congress only envisioned the trusts as land protection devices, and (2) because Congress did not intend settlement trusts to confer special benefits on subclasses of Natives. We reject both these arguments and affirm the district court's holding that the EST conforms with the provisions and purpose of ANCSA.

First, the argument that the settlement trust was intended only as a method by which corporations could shield *land* from creditors is belied by ANCSA's text and history. The EST, admittedly, does not aim specifically

to protect land.[1] But the text of ANCSA imposes no limitation on what can properly be the res of the trust. It allows Native Corporations to convey "assets (including stock or beneficial interests therein) to a Settlement Trust." 43 U.S.C. § 1629e(a)(1)(A). The permissible purposes given in the text do not relate only to interests in land: "The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1). Furthermore, ANCSA does specifically proscribe several purposes,[2] but nowhere does the text of ANCSA's settlement trust option prohibit the purposes espoused by the EST.

Second, nothing in the text of the settlement trust provisions prohibits trust distributions to less than all shareholders. In his dissent, Judge Kleinfeld argues that the EST is nothing more than an impermissible "birthday present" to elder shareholders at the expense of those not

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[1] The purpose of the EST is set forth in a document sent to shareholders entitled "A Shareholder Resolution: An Elders' Settlement Trust:"

> The purpose of the resolution is to provide a benefit to Sealaska elders in recognition of their contribution to Native culture and for the sacrifices they made to fight for and hold on to our lands. The actions of many of these people lead to the passage of the Alaska Native Claims Settlement Act (ANCSA).
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> An additional purpose is to provide health, education and welfare through a one-time cash distribution.

[2] For instance, a settlement trust may not operate as a business. 43 U.S.C. § 1629e(b)(1)(A).

yet 65 years old. Under his interpretation of the settlement trust option, *any use* of a settlement trust to benefit a subset of shareholders is improper. Such an interpretation of Section 1629e would render the settlement trust option superfluous for any purpose except as a land preservation mechanism. Alaska law and ANCSA already allow regional corporations to distribute dividends to all shareholders equally. Admittedly, the Native corporations could still use settlement trusts to preserve Native land and to protect it from creditors, while making equal distributions to all shareholders through the trust instead of through traditional corporate dividends. But nothing in ANCSA supports such a limited interpretation of the settlement trust provisions.

The legislative history of the 1987 amendments to ANCSA suggests a much more expansive purpose for settlement trusts:

> Settlement Trusts are expected to serve *two principal functions*. They are intended to be permanent, Native-oriented institutions which shall hold and manage, in perpetuity, any historic or culturally significant surface lands, sites, cemeteries, traditional use areas, or monuments, for the benefit of the beneficiary population. . . .
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> The other prime function relates to the health, education and economic welfare of its beneficiaries. . . . At the discretion of the trustees, [trust assets or income from trust assets] can be used to *provide scholarships* and other educational benefits. Assets can be used to improve health care delivery or facilities, *pay for needed health care* and otherwise be devoted to bettering the health of the beneficiary Native

> community. Finally, the Trust assets may be used to bolster the economic well-being of the beneficiaries. *Trust distributions may be used to fight poverty, provide food, shelter and clothing, and serve comparable economic welfare purposes.* Additionally, cash distributions of trust income may be made on an across-the-board basis to the beneficiary population as part of the economic welfare function.

133 Cong. Rec. H11,933 (daily ed. Dec. 21, 1987) (House Explanatory Statement), *reprinted in* 1987 U.S.C.C.A.N. 3299, 3307-08 (emphasis added). This description clearly permits across-the-board distributions to all shareholders. But it permits these distributions *in addition* to other anticipated uses of settlement trusts – such as distributions to bolster the economic well-being of individual members of the Native community through scholarships, or provisions for food, shelter, clothing, and needed health care. It is nonsensical to assume that if the shareholders vote to create a settlement trust to provide educational scholarships, that these scholarships must be distributed to every shareholder regardless of whether the shareholder is a student. Also, if a settlement trust is used to "fight poverty," or "provide food, shelter and clothing" then it seems reasonable that distributions will be made based on need, rather than on an across-the-board basis.

In promulgating the 1987 amendments, Congress noted that the corporate structure is not in every instance "well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values." 43 U.S.C. § 1601 note (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987) (Supp.

1995). Therefore, Congress intended the amendment to "enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs." *Id.* To require that settlement trust distributions be treated in every way like corporate dividends would simply reinforce the corporate structure, and limit the flexibility with which shareholders could structure their settlement.

Both the text and the legislative history support the contention that Congress intended settlement trusts as flexible instruments that would serve a number of purposes besides simply shielding Native land from creditors. Section 1629e gives a broad statement of the permissible purposes for settlement trusts, i.e., to promote the health, education, and welfare of the Native population. Nothing in this section explicitly prohibits distributions to less than all shareholders, except groups composed primarily of corporate insiders.[3] Although, as the dissent suggests, Alaska corporations law could serve to prohibit such distributions, the legislative history of the settlement trust provisions suggests that Congress intended to allow distributions to subsets of shareholders. Therefore, given the broad statement of purpose for settlement trusts, and the further elaboration of this

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[3] Furthermore, the Congressional findings that accompany the 1987 ANCSA amendments state that "by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not expressing an opinion on the manner in which such *shareholders choose to balance individual rights and communal rights.*" 43 U.S.C. § 1601 note (Supp. 1995) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987).

purpose in the legislative history, the most reasonable interpretation of Section 1629e would allow Native corporations to establish settlement trusts to benefit subclasses of shareholders.

Congress placed few limitations on the use of settlement trusts, thus enabling Native Corporations the greatest flexibility to structure their settlement to best fit the particular needs of their community. This might be construed to suggest that Native Corporations can use settlement trusts to contravene Alaska corporations law with impunity, and to thereby disadvantage many shareholders.

ANCSA does, however, limit the use of settlement trusts in several ways. It proscribes some trust activities, and defines the specific purposes for which these trusts may be created, i.e., for the health, education, and welfare of the Native community. Although this allows a wide range of applications, to simply quote this language in the preamble of a settlement trust resolution does not by itself confer validity on the proposed trust, as the dissent suggests. Judicial review of these trusts will prevent egregious violations of the settlement trust option, such as those "bizarre transfers" cited by the dissent. For example, these limits would easily preclude a trust that sought merely to discriminate against shareholders who were not members of the majority shareholders' extended family.

Furthermore, ANCSA requires majority or supermajority shareholder approval before corporations may transfer assets to these trusts. 43 U.S.C. § 1629b(d). As with any major corporate decision, shareholder approval

does not necessarily guarantee that the outcome is the most prudent course of action. But it does provide some measure of oversight. Finally, ANCSA specifies that Alaska state law governs settlement trusts in many instances, insofar as the state laws do not conflict with ANCSA. For example, Alaska trust law governs the creation and management of the trust, and Alaska corporations law defines the requirements for proxy solicitation materials, as is discussed in part III below. These limitations should provide shareholders with sufficient protection with respect to settlement trusts, while also leaving enough flexibility to meet Congress' goals.

In conclusion, the ANCSA settlement trust provisions preempt Alaska Corporations Code with respect to discriminatory settlement trusts. Sealaska's establishment of the EST conforms with the provisions and purpose of the ANCSA settlement trust option. We therefore hold that the EST is a proper use of the settlement trust provisions of ANCSA.

III

Even if Sealaska properly created the EST as authorized by ANCSA, the plaintiffs argue that shareholder approval of the EST was improper under Alaska corporations law, and that disputed issues of fact render summary judgment improper. We agree with the district court's grant of summary judgment in favor of Sealaska on this issue.

First, the plaintiffs contend that the proxy solicitation materials sent to shareholders were misleading and omitted material facts. The 1987 ANCSA amendments make

clear that proxy statements and solicitations made in the course of a Native Corporation's efforts to establish a settlement trust must comply with state law. 43 U.S.C. § 1629b (Supp. 1995). Alaska law prohibits solicitations and proxy statements that contain material misrepresentations, i.e., statements that are "false or misleading with respect to a material fact [or] omit[]a material fact necessary in order to make a statement made in the solicitation not false or misleading." 3 Alaska Admin. Code, tit. 3, § 08.315(a); see also *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976) (same); *Brown v. Ward*, 593 P.2d 247, 249-50 (Alaska 1979) (although the letter of federal proxy rules does not apply to ANCSA corporations, the spirit does).

The plaintiffs assert a variety of claims that material facts were not disclosed or were concealed in the proxy materials. For example, they claim that Sealaska omitted a material fact by expressing the cost of the EST as a lump sum of about $6 million rather than as cost per share. The district court found, however, and we agree, that the proxy solicitation materials comported with Alaska law, and that plaintiffs failed to raise genuine issues of fact as to whether they were misleading or omitted material facts. Second, plaintiffs assert that shareholder approval of the EST resolution is invalid because nonvoting shares were not allowed to vote on the proposal. ANCSA provides that shares held by non-Natives that were acquired through inheritance do not carry voting rights. 43 U.S.C. § 1606(h)(2)(C) (Supp. 1995). Then, it specifically conditions approval of a settlement trust upon majority vote of "the total voting power of the corporation," defined as "all outstanding shares of stock that *carry voting rights*." 43 U.S.C. §§ 1629b(d)(1)(A) and 1629b(e) (emphasis

added). Thus, ANCSA itself provides that nonvoting shares have no right to vote on corporate resolutions establishing settlement trusts.

The plaintiffs seek to avoid this conclusion by arguing that under state law, nonvoting shares *do* get to vote on certain fundamental corporate changes. This argument fails, however, because, as discussed previously, section 1629b expressly states that corporate resolutions to establish a settlement trust shall be governed by the provisions of ANCSA, "[n]otwithstanding any provision . . . of the laws of the State." 43 U.S.C. § 1629b(a). Thus, the nonvoting shares were properly denied the right to vote on the EST resolution. Given the foregoing, we reject plaintiffs' claim that shareholder approval of the EST resolution was invalid and affirm the district court's grant of summary judgment on this claim.

IV

The plaintiffs' final argument is that section 1629e of ANCSA is unconstitutional as applied to them for two reasons: first, allowing creation of the EST impairs the shareholders' "contract" rights under the articles of incorporation, and thus, section 1629e violates the Due Process Clause of the Fifth Amendment; second, because it authorizes Sealaska to transfer $6 million of its corporate equity to the EST, section 1629e permits a "taking" of the disadvantaged shareholders' property in violation of the Fifth Amendment.

Plaintiffs assert their due process claim for the first time on appeal. Generally, an appellate court will not hear an issue raised for the first time on appeal. *Golden*

Gate Hotel Ass'n v. San Francisco, 18 F.3d 1482, 1487 (9th Cir. 1994) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). To have been properly raised below, "the argument must be raised sufficiently for the trial court to rule on it." *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989). Because this issue was not raised below, we decline to reach the merits. As to the takings claim, we agree with the district court that, as a matter of law, the claim fails. However, we do not agree with the district court's reasoning on this issue.

The district court began its analysis "with the assumption that the use of corporate assets to create the EST amounted to a taking of the non-voting shareholders [sic] equity in the corporation for which no compensation was provided." We question the validity of this assumption. The property interest plaintiffs seek to protect is the value of their Sealaska stock.[4] But takings cases almost universally involve governmental action that affects ownership rights in *real property*, and plaintiffs cite no case authority for their claim that the Takings Clause protects their interest in Sealaska's corporate equity.

Furthermore, corporate shareholders do not directly own any part of a corporation's property or assets. They only own shares of stock, which represent a proportionate interest in the corporate equity remaining after a corporation meets all its other debts and obligations. The profits themselves belong to the corporation, and do not pass to the shareholders unless and until the board of

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[4] Plaintiffs claim that by transferring corporate assets to the EST – $6 million worth – Sealaska decreased its corporate equity, thus decreasing the value of its stock.

directors declares a dividend. Thus, the plaintiff shareholders have no proprietary interest that could have been "taken."

Nevertheless, even if we accept the premise that plaintiffs' interest in Sealaska's corporate equity may be the subject of a takings claim, the claim still fails for lack of sufficient government action. Takings jurisprudence encompasses two lines of authority: physical occupation cases, and regulatory takings cases. *Compare Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that New York law *requiring* landlords to allow cable television companies to install cables in their buildings constituted a physical intrusion sufficient to be a taking) *with Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992) (indicating that when a government land use regulation forces the owner of real property "to sacrifice all economically beneficial uses [of his property,] he has suffered a taking"). Plaintiffs allege no physical invasion of property, so their claim must fall into the regulatory taking category.

Regulatory takings generally require some government regulation or other government action that compels the owner to sacrifice all economically viable use of his or her property. *E.g., Lucas*, 112 S. Ct. 2886 (the state's coastal preservation statute prevented the landowner from building any structure on his property). In this case, Sealaska was not in any way compelled by the federal government to create the EST. The settlement trust option is just that – an option. That Sealaska's action was authorized by federal law does not transmute it into government action sufficient for the Fifth Amendment. Without governmental encouragement or coercion, actions taken

by private corporations pursuant to federal law do not transmute into government action under the Fifth Amendment. *See, e.g., Fidelity Financial Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) (finding no government action in a bank's loan decision even though the bank was created by a federal agency to accomplish federal objectives, was subject to extensive federal regulation, and some of the bank's directors and managers were appointed by a federal bank board). *But see Ginn v. Mathews*, 533 F.2d 477, 480 (9th Cir. 1976) (finding governmental action in an employment decision made by the Economic Opportunity Council of San Francisco, but emphasizing that the Council was operating with almost exclusively federal funds); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding government action largely on the basis that the defendant, a private lessee, received significant financial support from the parking authority). Even in cases in which the court found government action, it often reiterated the general principle that "[w]here the action taken is entirely by a private corporation with no overriding or pervasive [government] involvement, the provisions of the First, Fifth, and Fourteenth Amendments impose no limitations upon that action." *Ginn*, 553 F.2d at 479.

In this case, Sealaska is a private corporation that established the EST using private funds. The operation of the trust is not subject to governmental oversight. Furthermore, Sealaska was neither encouraged nor coerced into creating the EST by the federal government. It merely exercised its option under ANCSA to transfer its assets to a settlement trust. We therefore affirm the grant

of summary judgment in favor of Sealaska on the plaintiffs' takings claim.[5]

V

Through instruments like the settlement trust, Congress sought to expand the ability of Native Corporation shareholders to "structure the further implementation of the settlement in light of their particular circumstances and needs." 43 U.S.C. § 1601 note (Supp. 1995) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987). Sealaska did just that, establishing its Elders' Settlement Trust to address concerns related to the welfare of its elder shareholders. We conclude that Sealaska's Elders' Settlement Trust is a legitimate use of the settlement trust option as authorized by ANCSA, and that such use comports with the plain language and the purpose of the ANCSA amendments. The district court's order granting summary judgment in favor of Sealaska on all claims is AFFIRMED.

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[5] The district court ultimately concluded that the takings claim failed because the distribution of funds to elder shareholders was for a private use, and not a public use within the purview of the Fifth Amendment. The district court failed to see that takings for a private use, as opposed to a public use, are presumptively unconstitutional. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a public purpose, even though compensation be paid.' ") (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). Therefore, the district court erred when it held that because this alleged taking was for a *private use* it did not violate the plaintiffs' Fifth Amendment rights.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Sealaska, organized as a business corporation, decided to give each shareholder a $2,000 birthday present at age 65. That discriminates by age, because at the time of the decision, not all the shareholders were 65. Several directors would immediately or soon receive this substantial gift. Many shareholders would not receive the gift for decades. The present value of the gift, assuming a 5% interest rate, is $2,000 to a 65 year old director, $284 to a 25 year old shareholder.

This discriminatory cash gift to shareholders, as the majority acknowledges, would violate Alaska corporation law, if federal law does not provide otherwise. Under the Alaska Corporations Code, all Alaska corporations must treat all shares in the same class equally with respect to dividends and other rights. ALASKA STAT. §§ 10.06.542, 10.06.305(b).

The preemption analysis used in the majority opinion is mistaken, because any preemption is illusory. There cannot be federal preemption of state law in this case, because there cannot be any conflict between the two laws. The state law says that a native corporation can do anything ANCSA permits. ALASKA STAT. § 10.06.960(f). That means there can be nothing which ANCSA permits but state law prohibits, so there can be no conflicting state law to preempt. ANCSA says that a conveyance to a settlement trust should be in accord with Alaska law except to the extent that state law is inconsistent with ANCSA. 43 U.S.C. § 1629e(a)(1)(A). That means that there can be no preemption of the field. If federal law permits

the particular discriminatory cash transfer through the settlement trust, state law does too, and if not, not.

The majority opinion says that "[a]ccording to its plain language, then, ANCSA prohibits settlement trusts that discriminate in favor of corporate insiders, but does not prohibit trusts that discriminate in favor of other groups of shareholders." Maj. op. at 5872, at 426. The "plain language" consists only of the prohibition. The non-prohibition described in that sentence is an inference from silence, not an expression by Congress in plain language. The provision which provides the basis for the majority's conclusion states only what is prohibited, not what is permitted:

> The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives. A Settlement Trust *shall not* –
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> (A) operate as a business;
>
> (B) alienate land or any interest in land received from the settlor Native Corporation (except if the recipient of the land is the settlor corporation); or
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> (C) discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native Corporation.
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> An alienation of land or an interest in land in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

43 U.S.C. § 1629e(b)(1) (emphasis added). The majority reasons that because the statute prohibits trusts that discriminate in favor of employees, officers, and directors,

"but does not otherwise prohibit trusts that discriminate in favor of other groups of shareholders[,] [t]his statutory section suggests that ANCSA anticipates that trusts may discriminate in favor of a particular class of shareholders." Maj. op. at 5872, at 426.

This method of reasoning, inferring from the explicit prohibition of one form of discrimination the implicit authorization of all other forms, is a traditional application of the maxim, *expressio unius est exclusio alterius*. Quoting the maxim is less fashionable than it used to be before Karl Llewellyn's famous attack. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401-406 (1950), *as reproduced in*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, App. C, 521-35 (1960). But the logic of the maxim, that listing several specific things implies an intention to exclude others, is the only way to get from a statutory prohibition of some conduct to implied permission for other conduct. This is how the majority gets from the "shall not" in the statute to the majority's statement that "ANCSA anticipates that trusts may discriminate in favor of a particular class of shareholders."

The *expressio unius* analysis is often correct, but not always. It does not make sense here. Anytime a statute contains a list, the question arises whether the list exhausts all the things the legislature intended to permit or prohibit. The inference that a list excludes things not on the list does not relieve us of our duty to make sense of the statute:

> Most strongly put, the *expressio unius*, or *inclusio unius* principle is that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.' *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270, 20 L.Ed 570 (1871). This is a rule of interpretation, not a rule of law. The maxim is 'a product of logic and common sense,' properly applied only when it makes sense as a matter of legislative purpose. *Alcaraz v. Block*, 746 F.2d 593, 607-08 (9th Cir. 1984). Like the principle of construing a modifying clause to modify only the closer antecedent, the *expressio unius* principle describes what we usually mean by a particular manner of expression, but does not prescribe how we must interpret a phrase once written. Understood as a descriptive generalization about language rather than a prescriptive rule of construction, the maxim usefully describes a common syntactical implication. 'My children are Jonathan, Rebecca and Seth' means 'none of my children are Samuel.' Sometimes there is no negative pregnant: 'get milk, bread, peanut butter and eggs at the grocery' probably does not mean 'do not get ice cream.'

Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1312-13 (9th Cir. 1992).

It does not make sense to suppose that Congress meant, by the list in § 1629e(b)(1), to permit any kind of discrimination, except "discrimination in favor of . . . employees, officers or directors." Consider, by analogy, that Congress in the Americans With Disabilities Act said "[n]o covered entity shall discriminate against a qualified individual with a disability." 42 U.S.C. § 12112.

The ADA does not by that prohibition imply that discrimination by reason of age, sex, and race are permissible. The provision prohibits one kind of discrimination, and leaves it to other federal and state laws to prohibit others. That is the sensible way to read the prohibition in the statute before us.

This makes sense as a Congressional purpose. Congress might have felt that there were special risks to Native corporations that they would be taken advantage of by employees, officers and directors through the Settlement Trust mechanism, unique to Native Corporations, so more protection of shareholders from this device was needed than for ordinary business corporations, but felt that for other risks, state law protections were adequate. One of the virtues of the Alaska Native Claims Settlement Act was the creation of a large number of Alaska Native leaders experienced in business as well as politics, and employment opportunities in towns and villages where there had previously been little work for money wages. But this virtue could become a vice if the corporations were operated for the benefit of their employees, who might not be natives or shareholders, instead of for all the Natives who owned stock and would inherit stock.

Virtually any transfer of corporate assets could be provided for in a resolution which, in its preamble, said that the transfer was to "promote the . . . welfare of its beneficiaries," and, so long as the recipients were Alaska Natives, to "preserve the heritage and culture of Natives." Unless someone thinks of a distinction in some future case, the majority holding implies that Congress meant to permit some bizarre transfers of Native corporation assets. For example, a Native corporation might

decide that a particular candidate for office was likely to promote the health, education, and welfare of Alaska Natives better than competing candidates, and that Native culture would best be preserved by using a trust to pay $2,000 to each Native who signed an affidavit that he or she had voted for the named candidate. Quite a few Alaska native villages have fewer than 100 people, and many have under 300. *See* THE ALASKA ALMANAC: FACTS ABOUT ALASKA, 17TH EDITION, 130-31, 147-53 (Carolyn Smith ed.) (1993). Village Corporations may create settlement trusts under ANCSA. 43 U.S.C. §§ 1602 (defines "Native Corporation" to include "Village Corporation") and § 1629e (permits any Native Corporation to create a settlement trust). Under the majority construction of the statute, a village corporation, a majority of whose shareholders were linked by blood or property to a large extended family, might decide that Native culture was best preserved by funneling the assets through a settlement trust out to their family and not the other families in the village.

The majority says that "[j]udicial review of these trusts will prevent egregious violations of the settlement trust option, such as [these] 'bizarre transfers.' " But it does not say how. The majority opinion establishes that the federal law preempts state law, and "does not otherwise prohibit trusts that discriminate in favor of other groups of shareholders," and "trusts may discriminate in favor of a particular class of shareholders." Maj. op. at 5872, at 426. I hope that subsequent panels distinguish the case at bar if "bizarre transfers" through settlement trusts are made, but I do not see a basis, in the majority's *ratio decidendi*, for making a distinction.

In any corporation, Native or not, people with more power than others may try to translate their power into money. It is unlikely that Congress meant to deprive Native corporation shareholders of all the protections state corporation law generally gives to shareholders against discriminatory distributions of corporate assets. Yet the hypothetical forms of discrimination described above would not be "in favor of a group of individuals composed only or principally of employees, officers, or directors," so under the majority holding, any state law prohibiting such discrimination would be preempted. None of this seems likely to have been the intent of Congress, because it does not make any practical sense.

If we are to apply the *expressio unius* principle to anything, it should be to the statutory provision speaking directly to how to enhance benefits to elders. There is a special provision for issuance of up to 100 additional shares of regional corporation stock to natives who have attained the age of 65:

> A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock to –
>
> . . . .
>
> (III) Natives who have attained the age of 65, for no consideration or for such consideration and upon such terms and conditions as may be specified in such amendment or in a resolution approved by the board of directors pursuant to authority expressly vested in the board by the amendment. The amendment to the articles of incorporation may specify which

> class of Settlement Common Stock shall be issued to the various groups of Natives.

43 U.S.C. § 1606(g)(1)(B)(i).

The *expressio unius* inference, as applied to this section, implies that Congress intended that discrimination in favor of elders would take place only through regional corporations, not village corporations, and exclusively through amendments to the articles of incorporation issuing more stock to elders (which may, in turn, yield more dividends). See 43 U.S.C. § 1606(g)(1)(B)(iv) (common stock issued to elders as the result of a special amendments shall not have rights to certain distributions unless a majority of shareholders specially grant such rights). Accordingly, we could assume that Congress intended to leave in place state prohibitions against other forms of discrimination in favor of elders.

One use of settlement trusts is to preserve native corporation assets from creditors, *see* 43 U.S.C. § 1629e(c)(5), and from the consequences of accidental corporate dissolution. The statute states the purpose of settlement trusts, "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1). Most corporations cannot operate for such purposes, so excluding discriminatory dividends from the purposes does not strip the statute of practical effect. We need not decide whether the statements in the legislative history, such as that settlement trusts can be used to award scholarships to individuals, are correct. Perhaps such scholarship programs are permissible, so long as the criteria for the scholarship awards are nondiscriminatory. Or perhaps

this snippet of legislative history was a consolation prize to someone who did not get what he or she wanted in the statute. We should not assume the answer to one difficult question not before us in order to resolve another.

The majority relies too heavily, in my view, on the "House Explanatory Statement." Maj. op. at 5874, at 428. We should construe the statute, not the legislative history. See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987). Reliance on legislative history is often the "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J. concurring). The majority infers from the statement in the House Explanatory Statement that if scholarships are permissible, then so are birthday presents. A stronger inference would be that if "distributions of trust income may be made on an across-the board basis," House Explanatory Statement, 133 CONG. REC. H11,933, (daily ed. Dec. 21, 1987), *reprinted in*, 1987 U.S.C.C.A.N. 3299, 3308, then they cannot be made on a discriminatory basis.

In sum, the statute says some types of discrimination are prohibited, and also says that Native corporations can provide for issuance of additional shares of stock to elders. The majority reads a negative pregnant into the discrimination section but not the elders section. I do not see why the first inference is any stronger than the second, and see good reason for the contrary view. The majority infers from the statement about scholarships in the legislative history that discriminatory distributions

are permitted, but draws no inference that they are prohibited from the "across-the-board" language about distributions in the same paragraph. We must necessarily exercise judgment on difficult questions to decide the extent to which the statute exposes Native shareholders to discriminatory distributions of corporate assets. I believe Congress left in place more of the state law protection generally applicable to corporate shareholders than the majority does.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURIE ISAAC BROAD, et al., For Themselves and All Others Who Are Similarly Situated *Plaintiffs-Appellants* vs. SEALASKA CORPORATION, SEALASKA ELDERS' SETTLEMENT TRUST, et al., *Defendants-Appellees*	Docket No. 94-35310 **ORDER** FILED Jul 11, 1996

Before: HALL, WIGGINS and KLEINFELD, Circuit Judges.

Judges Hall and Wiggins have voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kleinfeld would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LAURIE ISAAC BROAD, et al., Plaintiffs, vs. SEALASKA CORPORATION, et al., Defendants	No. J93-0009-CV (HRH) ORDER (Motion for Summary Judgment)

The issue before the court is whether Sealaska Corporation (hereinafter "Sealaska"), a Native regional corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-28 (hereinafter "ANCSA"), can give its shareholders who are age 65 years or older a $20 per share benefit through an Elders' Settlement Trust. The suit is a direct action brought by shareholders of Sealaska against the corporation, the corporation's directors, and others, charging that the distribution scheme unfairly discriminates against shareholders who are not old enough to qualify for the $20 per share benefit. The disadvantaged shareholders have moved for partial summary judgment[1] against the corporation to establish the corporation's liability for failing to include the shareholders in the Elders' Settlement Trust.[2] The motion is opposed by Sealaska. Sealaska also

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[1] Clerk's Docket No. 14.

[2] The disadvantaged shareholders have also moved this court for an order striking the defendants' fourth affirmative

asserts its own motion for summary judgment[3] asking this court to find the Elders' Settlement Trust lawful. That motion is opposed by the plaintiff shareholders. The court has heard oral argument.

Sealaska is the Native regional corporation for Southeast Alaska. Its shareholders are predominantly Alaska Natives of Tlingitt, Haida, and Tsimpsian descent. Elders of these cultures occupy a special position of honor and respect. In keeping with this tradition and to provide special recognition to elders for their contributions to the development and passing of ANCSA, Sealaska announced in June, 1991, that it would be seeking shareholder approval of a method to benefit the corporation's elder shareholders. *See* Plaintiffs' Exhibits for Class Certification and Summary Judgment, Clerk's Docket No. 16, Exhibit 11, at 2 (stating, among other things, that the amendments to ANCSA provided at least four ways to transfer benefits to elder shareholders).[4]

The Board of Directors of Sealaska approved a resolution to establish an Elders' Settlement Trust. That resolution was put to a shareholder vote at the November 2,

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defense. Clerk's Docket No. 25. The court's resolution of the parties' cross-motions for summary judgment renders a decision on that motion unnecessary. The plaintiffs' motion to strike is denied as moot.

[3] Clerk's Docket No. 26.

[4] In November, 1990, Sealaska announced that it intended to provide the corporation's elders with a one-time payment of $2,000 per one hundred shares to be paid in December, 1990. Id., Exhibit 6, at 2. That payment plan was repealed by the corporation when its legal counsel concluded that such a plan needed shareholder approval. Id., Exhibit 9, at 3; Exhibit 10, at 3.

1991, shareholder meeting. *See id.*, Exhibit 14 at 8 (Notice of Annual Meeting and Proxy Statement). A proxy statement describing the resolution was mailed to all shareholders prior to the vote. *See id.*, Exhibit 14.

The resolution upon which the shareholders were to vote stated:

> Shall Sealaska Corporation establish an Elders' Settlement Trust as authorized in the Alaska Native Claims Settlement Act '1991 Amendments' to provide Elders (who are a defined class of shareholders aged 65 and over) with a one-time financial benefit of $20 per share of Settlement Common Stock owned by a shareholder as of November 2, 1991, and other benefits, or who are shareholders on November 2, 1991 and become aged 65 at any time during the life of the trust?

Id., Exhibit 14, at 8. The stated purpose of the Elders' Settlement Trust resolution in the proxy materials was:

> [T]o provide a benefit to Sealaska elders in recognition of their contributions to Native culture and tradition and the work that many of them did on the development and passage of the Alaska Native Claims Settlement Act. The benefit is intended to help provide for some of the special needs that our elders have related to health care and general welfare.

Id., Exhibit 14, at 8-9. The trust was to be funded by Sealaska's corporate assets with an initial transfer of approximately $6 million. *Id.*, Exhibit 14, at 13.

The proxy materials described the advantages and disadvantages of the Elders' Settlement Trust. *See id.*,

Exhibit 14, at 13-14. Among the advantages set forth were an immediate financial benefit to elder shareholders, the trust assets were protected from bankruptcy and creditor claims, and negligible tax consequences. *See id.*, Exhibit 14, at 13-14. The disadvantages listed were that the trust would be funded by corporate assets which belong to all shareholders, and that the trust was not immune from inflation. *See id.*, Exhibit 14, at 14. Additional limitations noted were that the trust benefit could not be willed or transferred and each shareholder's payment from the trust would be based on his or her stock ownership as of the date of the election. *See id.*, Exhibit 14, at 9.

In order to be adopted, ANCSA required that the Elders' Settlement Trust resolution receive an affirmative vote from a majority of the total voting shares of the corporation. *See* 43 U.S.C. § 1629b(d) (establishing the voting standards for settlement trusts), on the record date for the 1991 annual meeting, Sealaska had 1,546,198 outstanding voting shares. Affidavit of Leroy Funk, Clerk's Doc. No. 28. The trust resolution received 784,107 votes or 50.7 percent of all outstanding voting shares.

A. Summary Judgment Standard

A court will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. In other words, a motion for summary judgment asks the court to perform the threshold inquiry of whether there are "any genuine factual

issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). If genuine factual issues are found, summary judgment is denied. If, however, the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 250 (citations omitted).

B. Validity of the Elders' Settlement Trust

Both parties agree that the Elders' Settlement Trust discriminates under Alaska corporations law against shareholders who have as yet not reached the age of 65 years. The trust will be valid only if its creation is a legitimate use of the settlement trust option, 43 U.S.C. § 1629e, created under the 1987 ANCSA amendments and if federal law preempts Alaska corporations law in this area.

The first issue is whether the Elders' Settlement Trust created by Sealaska to exclusively benefit its elder shareholders through a $20 per share one-time distribution is a valid use of the settlement trust option under the 1987 ANCSA amendments. Plaintiffs concede that the 1987 amendments provided a method to benefit elder shareholders. They contend, however, that the exclusive method was the issuance of additional shares of elders' preference stock through the amendment of the articles of incorporation as permitted by 43 U.S.C. § 1606(g). Plaintiffs assert that the use of a settlement trust was an inappropriate vehicle to benefit elders, because the purpose of the settlement trust option was to place Native cemetery, cultural, and historic sites beyond the reach of

corporate creditors and to provide assets to maintain those sites.

1. The 1987 Amendments

In 1987, Congress amended ANCSA to ensure the continued success of the Native settlement and to guarantee Natives continued participation in decisions affecting their rights and property.[5] Included among the provisions

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[5] The congressional findings and declaration of policy for the ANCSA amendments of 1987 are set out below:

> The Congress finds and declares that –
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> (1) the . . . [ANCSA] was enacted in 1971 to achieve a fair and just settlement of all aboriginal land and hunting and fishing claims by Natives and Native groups of Alaska with maximum participation by Natives in decisions affecting their rights and property;
>
> (2) the settlement enabled Natives to participate in the subsequent expansion of Alaska's economy, encouraged efforts to address serious health and welfare problems in Native villages, and sparked a resurgence of interest in the cultural heritage of the Native peoples of Alaska;
>
> (3) despite these achievements and Congress's desire that the settlement be accomplished rapidly without litigation and in conformity with the real economic and social needs of Natives, the complexity of the land conveyance process and frequent and costly litigation have delayed implementation of the settlement and diminished its value;
>
> (4) Natives have differing opinions as to whether the Native Corporation, as originally structured by the. . . . . [ANCSA], is well adapted to

added to ANCSA, Congress provided that "[a] Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extent that such laws are inconsistent with this section and section 1629b of this title)". 43 U.S.C. § 1629e(a)(1)(A); *see id.* § 1629b (detailing specific procedures for creation of settlement trusts by a Native regional corporation). The purpose of the settlement trust option as described in the Act was "to promote the health, education, and welfare of its

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the reality of life in Native villages and to the continuation of traditional Native cultural values;

(5) to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property, the . . . [ANCSA], must be amended to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs;

(6) among other things, the shareholders of each Native Corporation must be permitted to decide –

(A) when restrictions on alienation of stock issued as part of the settlement should be terminated, and

(B) whether Natives born after December 18, 1971, should participate in the settlement;

(7) by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not expressing an opinion on the manner in which such shareholders choose to balance individual rights and communal rights. . . .

Act of February 3, 1988, Pub. L. 100-241 § 2, 101 Stat. 1788.

beneficiaries and preserve the heritage and culture of Natives". *Id.* § 1629e (b) (1). A settlement trust could not operate as a business, alienate Native land or an interest in Native land, or "discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native corporation". *Id.*

The Elders' Settlement Trust comports with the plain meaning of the 1987 ANCSA amendments. The purpose of the Elders' Settlement Trust was to provide for the special health and welfare needs of Sealaska's shareholders over the age of 65 years and to afford a gesture of honor and respect to these shareholders in keeping with Native culture. These purposes conform fully with the limitations of the settlement trust option of ANCSA as described by section 1629e(b)(1).[6]

The Plaintiffs claim that the exclusive method of benefiting elder shareholders was through the issuance of additional shares of elders' preference stock under section 1606(g). The plaintiffs do not, however, direct the court's attention to statutory language evincing congressional intent to limit the methods available to a Native corporation to benefit its elder shareholders. The court concludes that no such limitation was intended. To the

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[6] Although the court finds the statutory language unambiguous and thus finds it unnecessary to look to the legislative history of the 1987 ANCSA amendments, *see In re Kelly*, 841 F.2d 908, 912 (9th Cir. 1988), the legislative history supports the view that Congress contemplated that the settlement trust assets could be used "to bolster the economic well-being of the beneficiaries". *House Explanatory Statement*, 133 CONG. REC. H.11933 (Dec. 21, 1987), *reprinted* in 1987 U.S.C.C.A.N. 3299, 3307-08.

contrary, the statutory language authorizing the issuance of additional shares of stock to elders manifests the freedom Congress sought to provide regional corporations' attempts to benefit their shareholders. *See id.* § 1606(g). Section 1606(g) permits the corporation to issue additional shares of stock to Natives who have obtained the age of 65. Such stock may be either Settlement Common Stock issued pursuant to 1606(g)(1)(B)(i)(III) or other forms of stock issued pursuant to 1606(g)(2)(A). Settlement Common Stock carries with it the right to vote, the right to receive dividends, and all other rights of a shareholder in an Alaskan corporation. *See id.* § 1606(h)(1)(A). In addition to Settlement Common Stock, other more specialized forms of common or preferred stock may be issued by a regional corporation to its elder shareholders with such relative dividend, voting, liquidation, and other rights as the approving shareholders shall authorize. *See id.* § 1606(g)(2)(B).[7] A purpose of the 1987 ANCSA amendments was "to enable the shareholders of

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[7] It is not surprising that 1987 ANCSA amendments regarding the issuance of additional shares requires amendment of the articles of incorporation since, as a general rule, the number of shares a corporation is authorized to issue must be set forth in the articles of incorporation. *See* AS 10.06.208(5)-(6); REVISED MODEL BUSINESS CORPORATION ACT § 2.02 (a) (2). In the case of benefiting elders, the 1987 ANCSA amendments require a similar affirmative vote of the shareholders whether the benefit is through the issuance of additional shares of stock or via a settlement trust. *See* 43 U.S.C. § 1629b(d)(1) (stating that the affirmative vote of the shareholders of a Native Corporation required to authorize additional shares or create a settlement trust is a majority of the total voting power of the corporation unless the corporation establishes a level greater than a majority through the amendment of its articles of incorporation).

each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs". Act of February 3, 1988, Pub. L. 100-241, § 2, 101 Stat. 1788. The use of a settlement trust instead of additional stock to benefit elders conforms with the plain meaning and purpose of the 1987 ANCSA amendments.

2. Federal Preemption

Alaska law prohibits discriminatory treatment among a class of shareholders. AS 10.06.305(b). Therefore, the Elders' Settlement Trust, which provides a distribution of benefits to discrete members of a class of shareholders at the exclusion of the remainder of the class, will be valid only if federal law preempts Alaska law with regard to this distribution. Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, are invalid. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2481 (1991). Congressional intent to preempt state authority may be found in the following ways. First, Congress may express its intent to supplant state authority in a particular field in the terms of the statute. *Id.* at 2481. Absent express language, Congress' intent to preempt state law may be implied:

> [I]f a scheme of federal regulation is so "pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same

> subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority.

Id. at 2481-82 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

With respect to the Settlement Trust arrangement the statutory language of the 1987 ANCSA amendments establishes that Congress expressly intended to preempt Alaska law with regard to equivalent treatment of a class of shareholders of a Native regional corporation. In setting out the procedures for considering amendments and resolutions authorized by the 1987 ANCSA amendments, Congress has provided that:

> (a) Coverage
>
> Notwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation or of the laws of the State, except those related to proxy statements and solicitations that are not inconsistent with this section –
>
> . . . .
>
> (3) a resolution to establish a Settlement Trust; or
>
> . . . .
>
> shall be considered in accordance with the provisions of this section.

43 U.S.C. § 1629b(a). Congress could not have been more explicit in providing that resolutions for the establishment of settlement trusts are to be governed by federal law, not the laws of the State of Alaska. If that were not enough, Congress underscored its intent by making

express provision that certain aspects of the process (proxy statements and solicitations) would be governed by State law to the extent that the same were not inconsistent with § 1629b(a). AS 10.06.305(b) is preempted for purposes of the settlement trust distribution which the Sealaska shareholders approved.

Congressional intent to preempt Alaska law is equally evident in the goals sought to be obtained by the creation of a settlement trust option for regional corporations. The purpose of the settlement trust option is to permit Native corporations to promote the health education, and welfare of trust beneficiaries. *See* 43 U.S.C. § 1629e(b)(1). Alaska's requirement that all shareholders be treated equally would thwart that purpose because it would hinder any settlement trust that sought to benefit discrete members of a class of shareholders. To effectuate the purposes envisioned by the settlement trust option, Congress intended to supplant contrary Alaska law.[8]

A settlement trust may provide for dissimilar treatment of different members of a class of shareholders so long as it is formed to promote the health, education, and welfare of the trust beneficiaries. The Elders' Settlement Trust seeks to benefit Sealaska shareholders 65 years of age and older in recognition of their special health and

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[8] Additional support for preemption of Alaska law in this instance can be found in the state statutes. The Alaska legislature has expressly conceded that regional corporations are governed by ANCSA to the extent ANCSA is inconsistent with the Alaska Corporations Code. See AS 10.06.960(f). Alaska law requiring equal treatment of members of a class of shareholders is inconsistent with the purposes of the settlement trust option.

welfare needs and as a gesture of honor and respect. The Elders' Settlement Trust is a legitimate use of the settlement trust option and the trust could be used to benefit discrete members of a class of shareholders of Sealaska despite state law requiring a class be treated similarly.

C. Disclosures to Shareholders Regarding Trust

The next issue is whether Sealaska's disclosures to its shareholders in soliciting proxies to vote on the adoption of the Elders' Settlement Trust meet the applicable legal requirements. The 1987 ANCSA amendments provide the basic procedure for a Native Corporation to consider a resolution establishing a settlement trust. *See* 43 U.S.C. § 1629b. These procedures are to be considered, "[n]otwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation or of the laws of the State, except those related to proxy statements and solicitations that are not inconsistent with this section. . . . "*Id.* § 1629b(a)[9] For a resolution to create a settlement trust approved by the board of directors of a Native Corporation, section 1629b requires that written notice setting forth the resolution be given to the shareholders not less than 50 days nor more than 60 days prior to a shareholder meeting. *Id.* § 1629b(b)(2)(A). The corporation is further permitted to "communicate with its shareholders at any time and in any manner authorized by the laws of the State". *Id.*

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[9] ANCSA expressly exempts Native corporations from the federal securities laws that govern proxy solicitations. 43 U.S.C. § 1625.

Alaska law governing the content of proxy solicitations prohibits management from making misleading statements or omitting a material fact necessary in order to make the statements made not misleading. AS 45.55.160; *see Alaska Admin. Code* tit. 3, § 08.315 (prohibiting false or misleading proxy solicitations to shareholders of corporations organized pursuant to ANCSA). A misrepresentation is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. *Alaska Admin. Code* tit. 3, § 08.315

The parties do not dispute that the creation of the Elders' Settlement Trust complied with – the procedures prescribed by the 1987 amendments: resolution of the Board of Directors and written notice to the shareholders. The plaintiffs assert that Sealaska's proxy disclosures regarding the Elders' Settlement Trust, however, were incomplete, inaccurate, and misleading. Specifically, Sealaska failed to disclose: (1) that numerous shareholders opposed the trust; (2) that creation of the trust without amendment of the articles of incorporation is contrary to law; (3) that the purpose of the settlement trust option was protection of land; (4) that a high percentage of shareholders would be excluded from the trust; (5) that new shareholders who acquire their shares after November 2, 1991, are not eligible for the Elders' Settlement Trust; (6) that heirs of shareholders who died under the age of 65 years were not eligible for trust benefits; (7) that a distribution required amendment of the articles of incorporation; and (8) that the majority of the directors were eligible for the trust or would be eligible within five years.

The September 3, 1991, proxy statement provided shareholders of Sealaska with a description of the settlement trust option set forth by Congress and a detailed description of how that option could be used to benefit shareholders of Sealaska who reach the age of 65 years. *See* Plaintiffs' Exhibits for Class Certification, Clerk's Docket No. 14. In addition to the advantages available through the creation of an Elders' Settlement Trust, the proxy statement disclosed the limitations associated with the trust. In particular, the September 3, 1991, statement specifically disclosed the limitations raised by the plaintiffs. The statement revealed that eligibility to receive the trust benefit would be limited to those shareholders over the age of 65 years. *Id.*, Exhibit 14, at 9. The proxy statement also explained the eligibility requirements; that eligibility for an amount of any trust benefit was determined by a shareholder's ownership of Sealaska shares as of November 2, 1991. *Id.* New shareholders who acquire their shares after November 2, 1991, would not be eligible for a trust benefit. Finally the statement further explained that the trust benefit could not be willed or transferred. *Id.* Thus heirs of shareholders who died under the age of 65 years were not eligible for trust benefits.

In addition to the limitations described, the proxy statement also outlined the specific disadvantages of the Elders' Settlement Trust; that the trust would cost approximately $6 million of corporate resources to fund and that the financial benefit of the trust was not inflation proof. *Id.*, Exhibit 14, at 13-14. The plaintiffs have not directed the court's attention to, nor does the court find anything misleading about the presentation put forth in

the proxy statement. Instead, the court believes the corporation furnished an accurate depiction of the Elders' Settlement Trust and its effect on Sealaska and Sealaska's shareholders.

Plaintiffs have contended that it should have been disclosed to the shareholders that the creation of the settlement trust without an amendment of the articles of incorporation was contrary to law, that the purpose of the settlement trust option was to protect land and that a distribution required amendments to the articles of incorporation. The first and third of these contentions overlap and assert propositions which are just plain wrong. As discussed above, § 1629b(a) expressly preempts state law and as regards settlement trusts provides that they may be created and implemented "[n]otwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation". The contention that the purpose of the settlement trust was to protect land is also wrong as discussed above. Section 1629(e) makes express provision for the conveyance of corporate assets to a settlement trust stating:

> A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust. . . .

43 U.S.C. § 1629e(a)(1)(A). Plainly Congress intended that any corporate assets, even stock, might be placed in a settlement trust. Accordingly there was no basis for Sealaska to have made the disclosure for which the plaintiffs argue.

Following the proxy statement, Sealaska shareholders received a pamphlet providing more information

about the Elders' Settlement Trust. *Id.*, Exhibit 16. The pamphlet again discussed the trust's purpose, its positive and negative aspects, as well as the results of a shareholder survey on the topic of giving a special benefit to elder shareholders. *See id.* In addition to the pamphlet, the Sealaska shareholders received a number of other announcements about the Elders' Settlement Trust, each stating that the board of directors of Sealaska favored the formation of the trust and recommending the shareholders vote in November, 1991.[10] The court concludes that these materials did not contain any misleading statements or representations.

Plaintiffs claim that statements by Sealaska that there was substantial shareholder support for the Elders' Settlement Trust was misleading because a 1982 shareholder survey showed that only 10% of the shareholders favored providing a benefit to elders. *See id.*, Exhibit 1, at 15, ¶ 7b. The plaintiffs' evidence does not have any tendency to show that the 1991 Sealaska proxy materials were misleading because the evidence does not indicate whether the shareholders supported or opposed a benefit

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[10] *See id.*, Exhibit 11 (copy of *Sealaska Shareholder*, June, 1991, magazine with advertisement describing shareholder support for benefiting elders); Exhibit 17 (October 3, 1991, letter from Marlene Johnson, Chairman of the Board of Sealaska, stating that the board of directors favored creation of the trust and suggesting shareholders cast vote); Exhibit 18 (copy of October 31, 1991, Elders' Settlement Trust bulletin stating that the board of directors favored trust and suggesting shareholders cast a vote for the trust) Exhibit 19 (copy of *Sealaska Shareholder*, Oct.-Nov., 1991, magazine stating that the board of directors favored the trust and recommending shareholders cast a vote for the trust).

to elders, but instead merely shows that, in relation to numerous other activities that Sealaska could engage in, benefiting elders received the support of 10% of the shareholders. *See id.*

Plaintiffs assert that Sealaska failed to disclose that the majority of directors that approved the trust were 65 years old or would reach 65 years within the next five years. The plaintiffs, however, offer no evidence to support this assertion. Furthermore, Sealaska counters that only five of the 16 directors were either 65 years of age (2) or between the ages of 60 and 64 years (3). Thus, this is not a situation where the proxy materials promulgated by the board of directors recommended the trust but failed to adequately disclose the board members' self-interest. *See Mills v. Electric Autolite Co.*, 403 F.2d 429, 435 (7th Cir. 1968), *vacated on other grounds and remanded*, 396 U.S. 375 (1970), *after remand*, 552 F.2d 1239 (7th Cir. 1977).

The court concludes as matter of law that the proxy solicitation regarding the creation of the Elders' Settlement Trust comported with applicable law and plaintiffs failed to show that the management's proxy materials made misleading statements or omitted material facts necessary in order to make the statements made not misleading.

D. The Shareholder Vote

The final issue raised is whether Sealaska obtained the requisite amount of affirmative shareholder votes for the creation of the Elders' Settlement Trust. The 1987 ANCSA amendments set forth the procedures for considering resolutions to establish settlement trusts. *See* 43

U.S.C. § 1629b. A resolution to establish a settlement trust "shall be considered approved by the shareholders of a Native Corporation if it receives the affirmative vote of shares representing – (A) a majority of the total voting power of the corporation". *Id.* § 1629b(d)(1). Section 1629b(e) states:

> For purposes of this section, the determination of total voting power of a Native Corporation shall include all outstanding shares of stock that carry voting rights except shares that are not permitted to vote on the amendment or resolution in question because of restrictions in the articles of incorporation of the corporation.

On the record date for the 1991 annual meeting, Sealaska had 1,546,198 outstanding voting shares. Affidavit of Leroy Funk, Clerk's Docket No. 28. The trust resolution received 784,107 votes or 50.7 percent of the outstanding voting shares.

Section 1629b(e) says that the "determination of total voting power of a Native Corporation shall include all outstanding shares of stock that carry voting rights except those that are not permitted to vote . . . because of restrictions in the articles of incorporation [i.e., shares held by non-Natives] . . . " Because ANCSA permits disenfranchising non-Natives with respect to deciding the issue of giving their property to elders, plaintiffs claim section 1629b violates the Equal Protection and Takings Clauses of the United States Constitution. Thus, plaintiffs argue section 1629b is void and the 30,853 non-voting shares were entitled to vote under Alaska law on the establishment of the Elders' Settlement Trust.

With respect to plaintiffs equal protection argument, federal classifications involving Indians are valid if they "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Congress amended ANCSA "to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property". Act of February 3, 1988, Pub. L. 100-241, § 2, 101 Stat. 1788. Permitting only Native shareholders of a Native Corporation to vote for the creation of a settlement trust to benefit shareholders over the age of 65 years is rationally related to the fulfillment of Congress' obligation to the Natives, because it permits Natives to make decisions affecting their rights and property.

The non-Native shareholders alternative Fifth Amendment argument at least superficially presents a question of whether § 1629b works a taking of the plaintiffs' property through an adverse effect of a corporate gift upon the value of their Sealaska stock. Sealaska has not responded to this argument. The court declines to resolve this issue without further briefing.

In summary, the court concludes that the Elders' Settlement Trust is a legitimate use of the settlement trust option and that the settlement trust option could be used to benefit discrete members of a class of shareholders of a corporation established pursuant to ANCSA. The court also concludes that Sealaska's disclosures to its shareholders regarding the Elders' Settlement Trust comported with applicable law. Furthermore, restricting the shareholder vote on the trust to Native shareholders did not

violate the Equal Protection Clause of the Fifth Amendment. Finally, the court expresses no view on the Takings issue raised by plaintiffs, but requests a supplemental response by Sealaska on or before January 5, 1994, and a corresponding reply by plaintiffs on or before January 22, 1994.

DATED at Anchorage, Alaska, this 2 day of December, 1993.

/s/ H. Russel Holland
United States District Judge

cc: Fred Triem
Budd Simpson (BIRCH)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LAURIE ISAAC BROAD, et al., Plaintiffs, vs. SEALASKA CORPORATION, et al., Defendants.	No. J93-0009-CV (HRH) ORDER (Fifth Amendment Issues)

The court's order dated December 6, 1993, left open the question of whether or not the creation of the Elders' Settlement Trust pursuant to 43 U.S.C. § 1629b was an unconstitutional taking of non-Native shareholders property because of the adverse effect of a corporate transfer of funds upon the value of non-Native shareholders' Sealaska stock. The court requested a response to this issue from Sealaska. Sealaska has since responded. The plaintiffs have replied to that response.

Sealaska is the Native regional corporation for Southeast Alaska. Its shareholders are predominantly Alaska Natives of Tlingitt, Haida, and Tsimpsian descent. Sealaska was formed as part of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-42. That Act represented "a comprehensive and final resolution of all issues relating to native land claims in Alaska" whereby "Alaska natives agreed to the extinguishment of all their claims based on aboriginal title in exchange for fee title to more than 40 million acres and a cash settlement of almost one billion dollars." *Lee v. United States*, 629

F.Supp. 721, 728 (D. Alaska 1985). Regional corporations were established to receive the monetary settlement and to maximize Native participation in decisions affecting their rights and property. *Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*, 517 F.Supp. 1255, 1256 (D. Alaska 1981) *see* 43 U.S.C. § 1606 (creating regional corporations); and § 1605(c) (stating that federal monies are to be distributed among the regional corporations). Eligible Natives were given 100 shares of stock in the particular regional corporation in which they were enrolled. *See Id.* § 1606(g).

Congress has authorized Native regional corporations to create settlement trusts and fund the trusts with corporate assets. 43 U.S.C. § 1629e. In creating a settlement trust, Native corporations must follow the procedures, including voting standards, outlined by ANCSA. *See id.* § 1629b (procedures for establishing a settlement trust). The voting standards described prohibit a shareholder who is not a Native or a descendent of a Native from voting on a proposition to create a settlement trust. *See id.* § 1629b(e) (voting power of corporation for purposes of creating a settlement trust); and § 1629(h)(2)(C) (limiting voting power to Natives). In other words, ANCSA authorizes a Native regional corporation to transfer corporate assets to a settlement trust established pursuant to a shareholder vote in which only Native shareholders are entitled to vote.

Sealaska used approximately six million dollars of its assets to create a trust. Non-native Sealaska shareholders were not permitted to vote on the creation of the Elders' Settlement Trust. The non-Native shareholders say that

the use of corporate assets to create the trust amounted to a taking in violation of their Fifth Amendment rights.

The Fifth Amendment to the United States Constitution provides that private property may not be taken by the federal government for a public use without just compensation. "The purpose of forbidding uncompensated takings of private property for public use is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

The court begins with the assumption that the use of corporate assets to create the Elders' Settlement Trust amounted to a taking of the non-voting shareholders equity in the corporation for which no compensation was provided. The non-voting shareholders can assert a constitutional right under the Fifth Amendment has been violated only if they demonstrate that Sealaska's actions in creating the trust as authorized by ANCSA § 1629b(e) constitutes government action and that the discriminatory distribution of equity to elder shareholders is a "public use" within the purview of the Fifth Amendment.

The first issue is whether the creation of the Elders' Settlement Trust by Sealaska was government action. The Supreme Court has held that "a permanent physical occupation authorized by government is a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). *Loretto* involved a suit for trespass by a landlord against a cable television company for installing cable television cables pursuant to a New York law that required landlords to allow installation on their premises

in exchange for a one-time one dollar payment. *Id.* at 423. The Court allowed the Fifth Amendment taking claim against the cable company and concluded that the New York law authorizing the installation of cable television cables worked a taking of a portion of the landlord's property without just compensation. *Id.* at 441.

Section 1629b(e) allows Native corporations to create settlement trusts where authorized by a vote of Native shareholders. Sealaska created the Elders' Settlement Trust pursuant to a shareholder vote that excluded non-Natives. The trust was funded by six million dollars of Sealaska corporate assets. The net shareholder equity value of Sealaska stock necessarily decreased with the transfer of the corporate assets to the trust. Similar to the landlord in *Loretto*, those shareholders not entitled to vote can assert that § 1629b(e), which authorized the creation of the trust pursuant to a vote of only Native shareholders, effects a taking of their property right to the value of their Sealaska stock. Sealaska's actions in creating the trust as authorized by ANCSA § 1629b(e) constitutes government action for purposes of a Fifth Amendment takings claim.

The next issue is whether the taking of the shareholders property right to the value of their Sealaska stock was taken for a "public use". "[T]he scope of the 'public use' requirement of the Takings Clause is coterminous with the scope of a sovereign's police powers" and the courts must give great deference to the judgment of Congress as to what constitutes a "public use". *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (citations omitted). Further, it is not necessary that the general public benefit in order for this to be a "public use". *Id.* "So long as the

taking has a conceivable public character, the means by which it will be attained is for Congress to determine." *Id.* (citation omitted).

The creation of the Elders' Settlement Trust to benefit Sealaska shareholders over the age of 65 years is not for a "public use". Sealaska is simply taking equity from one group of shareholders and transferring it to another group of shareholders. The Elders' Settlement Trust was created from assets that belonged to all the shareholders of the corporation for the benefit of those shareholders who reach 65 years of age. It was specifically designed to benefit members of a vary narrow class of shareholders. The taking of the non-voting shareholders property right to the value of their Sealaska stock to benefit older shareholders was not a taking for a public use.

This court noted earlier the private character of the Elders' Settlement Trust in reaching its conclusion that the purpose of the Elders' Settlement Trust conformed with ANCSA. Specifically, ANCSA permitted the use of the settlement trust option "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." *Id.* § 1629e(b)(1). The court's December 6, 1993, Order concluded that the Elders' Settlement Trust comported with the plain meaning of ANCSA by providing for the special health and welfare needs of Sealaska's shareholders over the age of 65 years and affording a gesture of honor and respect to these shareholders in keeping with Native culture. Order, Clerk's Docket No. 63, at 9 (December 6, 1993). Health and welfare purposes sound superficially like public purposes. The court concludes, however, that Congress permitted a distinctly private use of the settlement trust

option. In this case, shareholders over the age of 65 years were benefited to the exclusion of the same class of shareholder not yet 65. Those benefits came to exist only because the Native corporation, with requisite shareholder approval, elected to create a settlement trust. This optional trust does not in any meaningful sense serve a "public" purpose.

The taking of the non-voting shareholders' property right to the value of their Sealaska stock to benefit older shareholders was not a taking for a "public use". The Elders' Settlement Trust does not violate the Fifth Amendment rights of the plaintiffs.

The plaintiffs' Motion for Summary Judgment[1] is denied. The defendants Motion for Summary Judgment[2] is granted. The clerk of court shall enter judgment dismissing plaintiffs' Complaint.

DATED at Anchorage, Alaska, this 4 day March of 1994.

/s/ H. Russel Holland
United States District Judge

cc: Fred Triem
E. Budd Simpson (BIRCH)

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[1] (Clerk's Docket No. 14).

[2] (Clerk's Docket No. 26).

FEDERAL STATUTES

Alaska Native Claims Settlement Act (ANCSA)

ANCSA § 7(h)(1)(A), [43 U.S.C. § 1606(h)(1)(A)]:

REGIONAL CORPORATIONS – SETTLEMENT STOCK –

Sec. (h)(1) RIGHTS AND RESTRICTIONS. –

(A) Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall –

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

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§ 1629e. Settlement Trust Option

(a) Conveyance of corporate Assets –

(1) (A) A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extent that such laws are inconsistent with this section and section 1629b of this title).

(B) The approval of the shareholders of the corporation in the form of a resolution shall be required to

convey all or substantially all of the assets of the corporation to a Settlement Trust. A conveyance in violation of this clause shall be void ab initio and shall not be given effect by any court.

(2) No subsurface estate in land shall be conveyed to a Settlement Trust. A conveyance of title to, or any other interest in, subsurface estate in violation of this subparagraph shall be void ab initio and shall not be given effect by any court.

(3) Conveyances made pursuant to this subsection –

(A) shall be subject to applicable laws respecting fraudulent conveyance and creditors rights; and

(B) shall give rise to dissenters' rights to the extent provided under the laws of the State only if the rights of beneficiaries in the Settlement Trust receiving a conveyance are inalienable.

(4) The provisions of this subsection shall not prohibit a Native Corporation from engaging in any conveyance, reorganization, or transaction not otherwise prohibited under the laws of the State or the United States.

(b) Authority and Limitations of a Settlement Trust

(1) The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries, and preserve the heritage and culture of Natives. A Settlement Trust shall not –

(A) operate as business

(B) alienate land or any interest in land received from the settlor Native Corporation (except if the recipient of the land is the settlor corporation); or

(C) discriminate in favor of a group of individuals composed only or principally of employees, officers or directors of the Native Corporation.

An alienation of land or an interest in land in violation of this paragraph shall be void ab initio.

(2) A Native Corporation that has established a Settlement Trust has exclusive authority to –

(A) Appoint the trustees of the trust

(B) Remove trustees of the trust for cause

Only a natural person shall be appointed a trustee of a Settlement Trust. An appointment or removal of a trustee in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(3) A Native Corporation that has established a Settlement Trust may expand the class of beneficiaries to include holders of Settlement Common Stock issued after the establishment of the trust without compensation to the original beneficiaries.

(4) A Settlement Trust shall not be held to violate any laws against perpetuities

(c) Savings –

(1) The provisions of this chapter shall continue to apply to any land or interest in land received from the Federal Government pursuant to this chapter and later

conveyed to a Settlement Trust as if the land or interest in land were still held by the Native Corporation that conveyed the land or interest in land.

(2) No timber resources subject to section 1606(i) of this title conveyed to a Settlement Trust shall be sold, exchanged, or otherwise conveyed except as necessary to –

(A) dispose of diseased or dying timber or to prevent the spread of disease or insect infestation;

(B) prevent or suppress fire; or

(C) ensure public safety.

The revenue, if any, from such timber harvests shall be subject to section 1606(i) of this title as if such conveyance had not occurred.

(3) The conveyance of assets (including stock or beneficial interests) pursuant to subsection (a) of this section shall not affect the applicability or enforcement (including specific performance) of a valid contract, judgment, lien, or other obligation to which assets, stock, or beneficial interests were subject prior to conveyance

(4) A claim based upon paragraph (1) (2) or (3) shall be enforceable against the transferee Settlement Trust holding the land, interest in land, or other assets (including stock or beneficial interests) in question to the same extent as such claim would have been enforceable against the transferor Native Corporation, and valid obligations arising under section 1606(i) of this title as well as claims with respect to a conveyance in violation of a valid contract, judgment, lien, or other obligation shall also be enforceable against the transferor corporation.

(5) Except as provided in paragraphs (1), (2), (3), and (4), once a Native Corporation has made, pursuant to subsection (a) of this section, a conveyance to a Settlement Trust that does not –

(A) render it –

(i) unable to satisfy claims based upon paragraph (1), (2), or (3); or

(ii) insolvent; or

(B) occur when Native Corporation is insolvent;

the assets so conveyed to the Settlement Trust shall not be subject to attachment, distraint, or sale on execution of judgment or other process or order of any court, except with respect to the lawful debts or obligations of the Settlement Trust.

(6) No transferee Settlement Trust shall make a distribution or conveyance of assets (including cash, stock, or beneficial interests) that would render it unable to satisfy a claim made pursuant to paragraph (1), (2), or (3). A distribution or conveyance made in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(7) Except where otherwise expressly provided, no provision of this section shall be construed to require shareholder approval of an action where shareholder approval would not be required under laws of the State.

(Pub.L. 92-203. § 39, as added Pub. L. 100-241, § 10, Feb. 3, 1988, 101 Stat. 1805.)

ALASKA STATUTES

AS 10.06.960. Corporations organized under Alaska Native Claims Settlement Act.

(f) Notwithstanding the other provisions of this chapter, a corporation organized under the act is governed by the act to the extent the act is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by the act, and the action is considered to be approved and adopted if approved under the act. An amendment approved under the act and delivered to the commissioner under AS 10.06.512 shall be filed by the commissioner under AS 10.06.910, and a certificate of amendment shall be issued.

(i) In this section, "act" means 43 U.S.C. 1601 – 1629e (Alaska Native Claims Settlement Act).

No. 96-756

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

LAURIE ISAAC BROAD, for himself and all others who are similarly situated,

Petitioners,

vs.

SEALASKA CORPORATION, SEALASKA ELDERS' SETTLEMENT TRUST, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the District of Alaska have federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(a)?

2. Does the preemption analysis applied by the United States Court of Appeals for the Ninth Circuit with respect to the preemption of Alaska Stat. § 10.06.305(b) by provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1629e, conflict with preemption analysis applied by other circuit courts?

3. Did the United States Court of Appeals for the Ninth Circuit err by holding that the Alaska Native Claims Settlement Act, 43 U.S.C. § 1629e, preempts Alaska Stat. § 10.06.305(b)?

LIST OF INTERESTED PARTIES*

Petitioners	Respondents
Laurie Isaac Broad	Sealaska Corporation
Marsha Simonds	Sealaska Elders'
Julie Wigg	Settlement Trust
Larry Taylor, Jr.	Patrick Anderson
Marc Simpson	Charles Carlson
Rebecca Simpson	Joseph Demmert, Jr.
Alora J. Winchester	L. Embert Demmert**
Emily Gotardo	Raymond Demmert
Barbara Crabtree	Jim Edenso
Angie Doak	Clarence Jackson, Sr.
Royann Churchill	Marlene A. Johnson
Leonard Valezquez	Albert Kookesh**
Arlene Bell Hanson	Ethel Lund
Victor Carl Davis, Jr.	Carlton Smith
Joyce Lewis***	Richard Stitt, Sr.
Clinton Lewis***	Ralph Strong
	Alan Williams
	Rosita Worl
	Marjorie Young

Each of the respondents joins in this brief of opposition.

---

* Pursuant to United States Supreme Court Rule 29.6, the petitioners state that Sealaska Corporation has no parent company and has no nonwholly-owned subsidiary.

** These names, which appear in the list filed with the Petition, are listed here with their correct spellings.

*** These names appear in the petitioners' amended complaint and do not appear in the list filed with the Petition.

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APPENDIX

Appendix A — Relevant Statutes, Act of February 3, 1988, Pub. L. 100-241, §§ 2, 101 Stat. 1813, 43 U.S.C. §§ 1606(h)(1)(A), 1629b(a), 1629e, Alaska Stat. §§ 10.06.305(b), 10.06.960(f) 1a

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Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Ninth Circuit. The court of appeals opinion is reported at 85 F.3d 422 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3381 (U.S. November 8, 1996) (No. 96-756). (For the convenience of the Court, all citations to the Ninth Circuit opinion will be to the opinion attached in the Appendix to the petition, pages 1 through 29).

STATEMENT OF JURISDICTION

The jurisdiction of this Court to grant certiorari for review of the decision of the Ninth Circuit Court of Appeals is conferred by 28 U.S.C. § 1254(1). Original and removal jurisdiction of the United States District Court for the District of Alaska is discussed below in Point I of this Brief in Opposition.

STATUTES INVOLVED

The statutory provisions involved in this case are portions of the Alaska Native Claims Settlement Act, found at 43 U.S.C. §§ 1601-1629f, and the Alaska state corporations code, Alaska Stat. § 10.06. The specific provisions involved are: 43 U.S.C. §§ 1606(h)(1)(A), 1629b(a), 1629e; Pub. L. No. 100-241, § 2, 101 Stat. 1788 (1988); Alaska Stat. § 10.06.305(b); and Alaska Stat. § 10.06.960(f). The texts of these statutes are attached in Appendix A.

STATEMENT OF THE CASE

Sealaska Corporation ("Sealaska") is the Alaska Native regional corporation for Southeast Alaska, established in 1971 pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629e. Sealaska's 16,000 shareholders are predominantly Alaska Natives of Tlingit, Haida,

and Tsimshian descent. Pursuant to ANCSA, shareholders received 100 shares each of Sealaska stock.

In 1987,[1] Congress substantially amended ANCSA "to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs." Pub. L. No. 100-241, § 2(5), 101 Stat. 1788 (1988); 43 U.S.C. § 1601 note (Supp. 1996) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987). One of the 1987 amendments added 43 U.S.C. § 1629e, which permits any Native corporation to convey assets into a "settlement trust" to be used "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1).

Elders occupy a special position of honor, respect, and great affection in traditional Tlingit, Haida, and Tsimshian culture. Sealaska had long sought means to assist and give special recognition to its elder shareholders, and the settlement trust option in 43 U.S.C. § 1629e finally made it possible for Sealaska to do this. In 1991, Sealaska's board of directors presented a resolution to a vote of the shareholders to establish the Elders' Settlement Trust ("Trust"). The Trust would be funded with corporate assets, and would distribute a one-time financial benefit of $20 per share to each shareholder upon reaching age 65. (Op. at 3-4.) The resolution passed with the affirmative vote of 73.7 percent of all shares voting on the issue, or 50.7 percent of all outstanding shares. Starting on December 10, 1991, and continuing thereafter as shareholders have reached age 65, the Trust has paid them $20 per share according to the terms of the resolution. (Op. at 4.)

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1. The amendments were referred to in Congress, and are referred to herein, as the 1987 amendments; in fact, they were enacted on February 3, 1988.

A. Course of Proceedings and Disposition of the Case Below.

In September 1992, the petitioners filed a purported class action lawsuit in the Alaska Superior Court claiming that the payments made by the Trust were illegal "constructive dividends." The petitioners asserted that the payments were illegal distributions because they discriminated between Sealaska shares of the same class. The complaint was cursory; it cited no state statute and did not mention the Alaska corporations code or common law. But the complaint did describe Sealaska as a corporation organized under ANCSA and the creator of the Trust.

The respondents removed the case to the United States District Court for the District of Alaska as presenting claims arising under federal law for which the district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(a) and (b).[2] The petitioners never moved for remand back to the state court, and did not otherwise indicate that they believed their claim was predicated solely upon Alaska law.

No trial or other evidentiary hearing of the petitioners' claim ever took place. On cross-motions for summary judgment, the district court entered several orders that, together, denied the petitioner's motion and granted the respondents summary judgment on all issues. The Ninth Circuit Court of Appeals affirmed, holding, *inter alia*, that ANCSA, 43 U.S.C. § 1629e, explicitly preempts state law with respect to corporate resolutions that establish settlement trusts and, with respect to settlement trust distributions, implicitly preempts Alaska Stat. § 10.06.305(b), which requires corporations to give equal treatment to all shares of the same class and prohibits discriminatory distributions.

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2. A copy of the respondents' verified notice of removal, together with the summons and complaint, is attached as Appendix B.

B. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15.2, the respondents bring to the Court's attention the following misstatements of fact contained in the petition.

The petition states that "[t]he complaint alleged Sealaska had breached its shareholder contract by paying dividends in violation of Alaska corporations statutes and in violation of the Alaska common law of corporations." (Petition at 17.) The petition also states that Sealaska "removed this case on the reasoning that the federal statute had preempted the corporations law of Alaska." (*Id.*) Contrary to the petitioners' representations, the complaint did not even mention, much less cite, any provision in the Alaska corporations code, nor did it refer to the Alaska common law of corporations. (*See* Complaint, Appendix B.) The petitioners' representation that Sealaska removed the case to the federal district court "on the reasoning" that Alaska's corporations law was preempted by ANCSA is likewise incorrect. The respondents removed the case to the federal district court because the complaint presented claims arising under federal law, namely ANCSA, 43 U.S.C. § 1629e, for which that court had federal question jurisdiction under 28 U.S.C. § 1331. (*See* Notice, Appendix B.)

Even the petitioners' amended complaint, filed after removal, did not mention the Alaska corporations code or Alaska common law.[3] A copy of the amended complaint is attached hereto as Appendix C.

Moreover, in their petition for certiorari, the petitioners

3. The amended complaint did cite, erroneously, a portion of the Alaska probate code, Alaska Stat. §§ 13.16.005-.300, with respect to registration of the Trust. The statutes that address registration of trusts are found at Alaska Stat. §§ 13.36.005-.025.

designate as the statutes "principally" implicated in this case only ANCSA (43 U.S.C. §§ 1606(h)(1)(A), 1629e) and Alaska Stat. § 10.06.960(f) (the state corporations code provision by which the code expressly yields to ANCSA on all matters related to Native corporations to the extent that ANCSA is inconsistent with the state law). The petitioners do not mention Alaska Stat. § 10.06.305(b), the state corporations code section that they allege is violated by the Trust. (Petition at 3.)

REASONS FOR DENYING THE WRIT

I.

REMOVAL OF THIS ACTION TO FEDERAL COURT WAS PROPER.

The petitioners challenge jurisdiction of the federal courts for the first time here. While jurisdiction may be considered at any time, *Louisville & N. R. v. Mottley*, 211 U.S. 149, 152 (1908), the petitioners effectively seek to amend their complaint to raise strictly state law claims, avoid federal jurisdiction, and gain an opportunity to obtain a result from the state courts on federal law issues that the federal courts have refused to give. Yet the petitioners concede that portions of ANCSA comprise "the statutes *principally* involved in this case." (Petition at 3 (emphasis added).)

The petitioners' reliance on *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), and the "well-pleaded complaint" rule is unavailing. First, a federal question is presented on the face of the petitioners' complaint, and the federal issue did not arise solely in anticipation of a defense. The complaint showed no exclusive reliance on state law. Second, even if the complaint could be fairly construed to have alleged a state cause of action under the Alaska corporations code, vindication of the state law

right depended completely upon resolution of an issue of federal law, making the claim one "arising under" federal law. Third, the preemptive force of the federal law at issue, 43 U.S.C. § 1629e, is so powerful that it displaces entirely any state cause of action for discrimination against certain shareholders by the Trust.

43 U.S.C. § 1331 grants the district courts original jurisdiction over claims "arising under the Constitution, laws, or treaties of the United States." 43 U.S.C. § 1441(b) permits removal on the basis of federal question jurisdiction without regard to the citizenship of the parties. As this Court observed in *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 8 (1983):

> [T]he statutory phrase "arising under the Constitution, laws, or treaties of the United States" has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts. Especially when considered in light of § 1441's removal jurisdiction, the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.

Justice Holmes defined "arising under" simply: "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Justice Holmes' test is a principle of inclusion rather than exclusion. *Franchise Tax Bd.*, 463 U.S. at 9. The "vast majority" of cases that come within section 1331's grant of jurisdiction are covered by Justice Holmes' statement — that is, cases in

which federal law creates the cause of action. *Id.* at 8-9. However, this Court has also noted that a case may arise under federal law "where vindication of a right under state law necessarily turned on some construction of federal law," or where a purportedly state claim "is 'really' one of federal law." *Id.* at 9, 13. *See also Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808-09 (1986) (a claim arises under federal law when vindication of a state law right depends upon resolution of a substantial question of federal law); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (same holding, over Justice Holmes' dissent).

The actual holding in *Franchise Tax Bd.* (a federal court is without jurisdiction to determine whether a state may collect unpaid taxes by imposing a levy on an ERISA plan) "demonstrates that this statement must be read with caution." *Merrell Dow Pharmaceuticals*, 478 U.S. at 809. Indeed, the powerful "well-pleaded complaint" doctrine "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court." *Franchise Tax Bd.*, 463 U.S. at 9. This Court has repeatedly stressed that "the party who brings a suit is master to decide what law he will rely upon." *Id.* at 22 (*quoting The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)). *See also Caterpillar*, 482 U.S. at 392; *Merrell Dow Pharmaceuticals*, 478 U.S. at 809 n.6.

Nevertheless, the petitioners' complaint clearly disclosed that the claim would stand or fall in accordance with resolution of a substantial federal law question in dispute between the parties. The petitioners actually confirm this point when they state:

> The statutes *principally* involved in this case are parts of the Alaska Native Claims

> Settlement Act [ANCSA]: ANCSA § 7(h)(1)(A) [43 U.S.C. § 1606(h)(1)(A)] Settlement Stock of Regional Corporation; *and* ANCSA § 39 [43 U.S.C. § 1629e] — Settlement Trust Option.

(Petition at 3 (first emphasis added).)

Although the complaint stated its cause of action with a paucity of words, it was obvious that the object of the action was a settlement trust established by an Alaska Native corporation as authorized by ANCSA. It was therefore obvious that a construction of the federal law governing settlement trusts, 43 U.S.C. § 1629e, would be essential to resolution of the petitioners' claim that the Trust unlawfully discriminated against certain Sealaska shareholders.

Even assuming, for the sake of argument, that the complaint stated a cause of action created by Alaska corporations law, vindication of the state right "necessarily turned on" the construction of 43 U.S.C. § 1629e. *Franchise Tax Bd.*, 463 U.S. at 9. Thus, a federal question was presented and jurisdiction was conferred on the district court. *Id.*

Moreover, "it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead *necessary* federal questions in a complaint." *Franchise Tax Bd.*, 463 U.S. at 22 (emphasis added) (*citing Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers*, 376 F.2d 337, 339-40 (6th Cir. 1967), *aff'd*, 390 U.S. 557, 559 (1968)).

Finally, this Court has on occasion "concluded that the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a

federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar*, 482 U.S. at 393 (*quoting Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). *See also Franchise Tax Bd.*, 463 U.S. at 24; *Oneida Indian Nation of New York State v. Oneida County*, 414 U.S. 661, 677 (1974) (state law complaint that alleged a present right to possession of Indian tribal lands necessarily "asserts a present right to possession under federal law," and is thus completely preempted and arises under federal law); *Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 559 (1968) (finding complete preemption of state law by the Labor Management Relations Act so that when "[t]he heart of the [state law] complaint [is] a . . . clause in the collective bargaining agreement," the complaint arises under federal law).

The settlement trust option, 43 U.S.C. § 1629e, lies at "the heart" of the petitioners' complaint. As explained in part III-B of this Brief in Opposition, the settlement trust statute so forcefully preempts contrary state law as to entirely displace any state cause of action challenging the creation, purposes, and characteristics of the Trust.

The petitioners' suit was properly removed to the federal district court.

II.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS ON THE SAME MATTER.

The petitioners attempt to persuade this Court to grant certiorari based on a supposed split among the circuits that this case could mend. On the contrary, as the petitioners' case law discloses, the circuit courts are not split on basic preemption

analysis. The petitioners have demonstrated only that the circuits have disagreed over the application of preemption to some specific statutes, such as the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360(a), that are unrelated to this case.[4]

Circuit disharmony over the construction of an unrelated statute does not amount to a conflict among the circuits on the matter of concern in this case. Resolving a conflict over the preemptive effect of other statutes will not resolve the controversy here. No other court — state or federal — has considered the preemptive effect of ANCSA's settlement trust provisions. Moreover, if the petitioners and dissenting Judge Kleinfeld are correct that "there is no basis for a preemption analysis" here, (Petition at 15), then the circuit conflict that the petitioners write of is not relevant to consideration of this case.

The lower courts do not "need instruction on . . . when they may resort to preemption analysis and when they may not," or "when they may rely upon broad statutory language . . . to find a preemption," (*id.* at 15), as the petitioners contend. Nor would such instruction be helpful. Preemption analysis is an "exercise of statutory construction," beginning with the text of the statute in question and turning upon congressional intent. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995). The specifics of the relationship between the relevant statutory provisions within the preemption framework is unique in each case. The nature of the problem of discovering congressional intent has necessarily resulted in judicial ad hoc balancing. While the significant criteria may be articulated, as discussed below, it is difficult to apply the rationale underlying a decision in one field to the

4. The Alaska Native Claims Settlement Act relates only to Alaska Natives; therefore, of all the federal circuit courts, only the Ninth Circuit could host a lawsuit arising under ANCSA.

problem in another context. As Justice Black cautioned in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941):

> But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

See also English v. General Electric Co., 496 U.S. 72, 79 n.5 (1990) (the categories of preemption are not "rigidly distinct"; for example, field preemption may be viewed as a form of conflict preemption).

Certiorari would be justified here only if the Ninth Circuit had entered its decision in conflict with the rulings of this Court, (United States Supreme Court Rule 10(c)), and it has not done so.

III.

THE NINTH CIRCUIT'S HOLDING IS IN ACCORD WITH THE DECISIONS OF THIS COURT. THE ANCSA SETTLEMENT TRUST OPTION PREEMPTS ALASKA LAW.

A. The Ninth Circuit Applied Correct Preemption Criteria.

The United States Constitution and the laws of the United States are the supreme law of the land. U.S. Const. art. VI. "Where a state [law] conflicts with or frustrates federal law, the former must give way." *CSX Transp., Inc. v. Easterwood*, 506 U.S. 658, 663 (1993). *See also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of

the constitution" are invalid). Federal preemption of state laws "may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)) (*quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53 (1982)) (in turn quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

This Court recently summarized basic preemption analysis in *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103 (1996):

> This question is basically one of congressional intent. Did Congress, in enacting the federal statute, intend to exercise its constitutionally delegated authority to set aside the laws of a state? If so, the Supremacy Clause requires courts to follow federal, not state, law. Sometimes courts, when facing the preemption question, find language in the federal statute that reveals an explicit congressional intent to preempt state law. More often, explicit preemption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent. A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the states to

> supplement it." Alternatively, federal law may be in "irreconcilable conflict" with state law. Compliance with both statutes, for example, may be a "physical impossibility"; or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 1108 (citations omitted).

The petitioners argue that whenever Congress includes an express preemption clause in a statute, courts "ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption." (Petition at 10 (*quoting Greenwood Trust Co. v. Commonwealth*, 971 F.2d 818, 823 (1st Cir. 1992).) However, this Court rejected the same argument in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), declining to adopt "a categorical rule precluding the coexistence of express and implied preemption" in a statute. *Id.* at 1487-88 (discussing *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 517 (1992)). A statute's express preemption clause "supports a reasonable inference that Congress did not intend to preempt other matters," but does not "entirely [foreclose] any possibility of implied preemption." *Freightliner*, 115 S. Ct. at 1488.

The petitioners urge this Court to instruct the lower courts that they must rest preemption on "the narrowest grounds possible." (Petition at 12). This Court has already instructed, repeatedly, that "state law is displaced only to the extent that it actually conflicts with federal law," and that "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Dalton v. Little Rock Family Planning Services*, 116 S. Ct. 1063, 1064 (1996) (*quoting Pacific Gas and Electric Co. v. State Energy Resources*

Conservation & Development Comm'n, 461 U.S. 190, 204 (1983), and *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)).

The Ninth Circuit's opinion honors the principles of preemption analysis prescribed by this Court. The court found that ANCSA "explicitly preempted state law with respect to corporate resolutions that establish settlement trusts,"[5] but that

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5. In setting out the procedures for considering amendments and resolutions authorized by the 1987 Amendments, Congress provided:

> (a) Coverage
>
> *Notwithstanding any provision* of the articles of incorporation and bylaws of a Native Corporation or *of the laws of the State*, except those related to proxy statements and solicitations that are not inconsistent with this section —
>
> . . . .
>
> (3) a resolution to establish a Settlement Trust;
>
> . . .
>
> . . . .
>
> shall be considered in accordance with the provisions of this section.

43 U.S.C. § 1629b(a) (emphasis added).

The provision authorizing ANCSA corporations to establish settlement trusts also states:

> A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (*except*

(Cont'd)

the relevant inquiry is "whether a state law that prohibits the *actions taken by the trust* is preempted by federal law." (Op. at 5-6 (emphasis in original).) Nevertheless, the court found "that ANCSA implicitly preempts state law [Alaska Stat. § 10.06.305(b)] in this respect." (*Id.* at 6.)

The Ninth Circuit focused on the intent of Congress and looked to "the provisions of the whole law, and to its object and policy," *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (*quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). (*See* Op. at 6-8.) The Court conducted an "exercise in statutory construction," *New York State Conference of Blue Cross*, 115 S. Ct. at 1677, and consulted the legislative history of the settlement trust option. (*See* Op. at 9-11.) Relying on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991), the court determined that Alaska Stat. § 10.06.305(b) is implicitly preempted because it stands as an obstruction to the "accomplishment and execution of the full purposes and objectives of Congress." (Op. at 6-7 (*quoting Hines v. Davidowitz*, 312 U.S. at 67-68).) This holding is consistent with *Barnett Bank*, 116 S. Ct. at 1108, and *Gade*, 505 U.S. at 98 (reconfirming "at least" two types of implied preemption, including conflict preemption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

B. The Ninth Circuit's Interpretation of ANCSA Is Correct; the Trust Is a Valid Use of the Settlement Trust Option.

Contrary to the petitioners' suggestion that the settlement

(Cont'd)

> *to the extent that such laws are inconsistent with this section and section 1629b of this title*).

43 U.S.C. § 1629e(a)(1)(A) (emphasis added).

trust option, and ANCSA as a whole, is silent regarding preemption of Alaska Stat. § 10.06.305(b), (Petition at 10), the congressional findings and statement of policy, the language of the statute, and the legislative history of the 1987 amendments all sustain the Ninth Circuit's conclusion.

ANCSA and the ANCSA Amendments of 1987 were enacted by Congress as "Indian legislation" . . . "pursuant to its plenary authority under the constitution of the United States to regulate Indian affairs." Pub. L. No. 100-241, § 2(9), 101 Stat. 1788 (1988); 43 U.S.C. § 1601 note (Supp. 1996) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Thus, to the extent any state law conflicts with ANCSA, it is preempted.

In enacting the 1987 Amendments, Congress found:

> Natives have differing opinions as to whether the Native Corporation, as originally structured by the Alaska Native Claims Settlement Act [this chapter], is well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values[.]

Pub. L. No. 100-241, § 2(4).

The 1987 amendments intended "to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property," and "to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs." *Id.* § 2(5). Finally, "by granting the shareholders . . . options to structure the further

implementation of the settlement," Congress expressly declined to state an opinion "on the manner in which such shareholders choose to balance individual rights and communal rights." *Id.* § 2(7).

Thus, the codified settlement trust statute provided that "the purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1). Section 1629e specifically prohibits only trusts "that discriminate in favor of a group of individuals comprised only or principally of employees, officers or directors of the settlor Native Corporation." 43 U.S.C. § 1629e(b)(1)(C). ANCSA's "plain language . . . prohibits settlement trusts that discriminate in favor of corporate insiders, but does not otherwise prohibit trusts that discriminate in favor of other groups of shareholders." (Op. at 6.) Alaska Stat. § 10.06.305(b), prohibiting discrimination among corporate shareholders, would surely obstruct this broadly stated autonomy of each Native corporation to identify its particular needs and frame a settlement trust to address those needs. "Discrimination" in favor of identified groups of shareholders whose needs were deemed greater is exactly what was intended for the settlement trusts.

While the Ninth Circuit did not phrase its holding in terms of "field preemption,"[6] the purpose clause of the settlement trust provisions is indicative of complete federal occupation of the field to delimit permissible goals of settlement trusts. Surely Congress was aware of the potency in the authority to "promote the health, education and *general welfare*" that it bestowed on the settlement trusts. 43 U.S.C. § 1629e(b)(1)(C) (emphasis

6. Perhaps the Ninth Circuit did not view it necessary to affix a label since, as this Court has observed, the categories of preemption are not "rigidly distinct," and field preemption "may be understood as a species of conflict preemption." *English*, 496 U.S. at 79 n.5.

added). Indeed Congress explained: "Subsection (b)(1) [of 43 U.S.C. § 1629e] establishes certain characteristics of the Settlement Trust. By doing so, Congress expressly intends to preempt State law with regard to these elements of Settlement Trusts." House Explanatory Statement, 133 Cong. Rec. H. 11933 (Dec. 21, 1987), *reprinted in* 1987 U.S.C.C.A.N. 3299, 3308.[7] An analogy is inescapable to the broad construction given by this Court to the "general welfare" spending clause in our own Constitution. U.S. Const. art. I, § 8, cl. 1.

> Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."

Mathews v. De Castro, 429 U.S. 181, 185 (1976) (*quoting Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

Contrary to the viewpoint of the dissent, (Op. at 24-25, Kleinfeld, J., dissenting), the general welfare standard "is not a toothless one." *DeCastro*, 429 U.S. at 185 (*quoting Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). But the challenged Trust, established in accordance with the procedure prescribed by ANCSA, would be entitled to a presumption of validity: "So long as [the shareholders'] judgments are rational, and not invidious, the [shareholders' and Trust's] efforts to tackle the problems of the poor and the needy are not subject to a [statutory] straitjacket." *Id.* at 185 (*quoting Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)). The statute's specific prohibition against

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7. Congress also explained that "conventional trust oversight functions" would remain within the jurisdiction of the state courts. *Id.* at 3309.

benefitting corporate insiders and the requirement of approval by a majority of all voting shareholders, 43 U.S.C. §§ 1629b(d)(A), 1629e(b)(1)(C), provide further protections.

The legislative history of the 1987 amendments supports this expansive interpretation of the purpose of the settlement trusts, and demonstrates that the Trust conforms to ANCSA. Congress enacted the 1987 Amendments to address problems inherent in the 1971 act.[8] Pub. L. No. 100-241, § 2, 101 Stat. 1788 (1988). The most urgent problem was the original act's stock alienation section. *See* 43 U.S.C. § 1606. The act restricted the alienation of ANCSA stock until 1991, when the stock would have become freely alienable. As 1991 drew closer, many Native leaders were apprehensive that ANCSA stock would be relinquished in a corporate takeover and the land belonging to the corporations would leave Native hands. *See* remarks of Congressman Don Young in 133 Cong. Rec. H. 11933 (Dec. 21, 1987).

Native leaders told Congress of their desire to change ANCSA to allow corporations more flexibility in implementing the act. This goal took shape as several identifiable objectives. One objective was to allow corporations to transfer land from the corporation to another entity in order to remove the land from the business risks that jeopardize corporate assets. Another was to create an entity dedicated to providing broad welfare benefits to Natives without the obstacles inherent in paying dividends to shareholders:

> The legislation would allow differential benefits from the corporations for Native

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8. For a summary of the legislative evolution of the settlement trust option provisions, *see* Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 Yale L.J. 1331, 1343 (1992).

> elders and other classes of Natives who deserve more from the settlement than the rest of us.

To Amend The Alaska Native Claims Settlement Act: Hearings on S. 2065 Before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the Senate Comm. on Energy and Natural Resources, 99th Cong., 2nd Sess., 101 (1986) (statement of William C. ("Spud") Williams, President, Tanana Chiefs Conference, Inc.).

The petitioners argued below that Congress created the settlement trust option for one exclusive purpose: land protection. The legislative history, however, belies this constricted view. Congress contemplated, and the Ninth Circuit found, a broader role, including use of settlement trust assets "to bolster the economic well-being of the beneficiaries." *House Explanatory Statement*, 133 Cong. Rec. H. 11933 (Dec. 21, 1987), *reprinted in* 1987 U.S.C.C.A.N. 3299, 3308. The following excerpts from the official Senate report demonstrate two goals for the settlement trusts:

> The Settlement Trust section is intended to enable Native Corporations to convey assets to Settlement Trusts in which the assets may be better managed for the benefit of the Alaska Natives.
>
> . . . *Settlement Trusts are expected to serve two principle functions.* They are intended to be permanent, Native-oriented institutions which shall hold and manage, in perpetuity, any historic or culturally significant surface lands, sites, cemeteries, traditional use areas, or monuments, for the benefit of the beneficiary population. . . .

> *The other prime function relates to the health, education and economic welfare of its beneficiaries.* Trusts may receive conveyances of securities, cash, or other assets which it must manage prudently, and passively, in the interests of its beneficiaries, and in conformance with the terms and conditions set forth in the trust instrument and this Act. . . . *[T]he Trust assets may be used to bolster the economic well-being of the beneficiaries. . . .*

Id. at 3307-08 (emphasis added).

This legislative history directly refutes the petitioners' assertion that Congress' sole purpose for the settlement trust option was to protect Native land. Sealaska's use of a settlement trust to benefit elders conforms with the purpose of the 1987 amendments.[9]

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9. The legislative history of 43 U.S.C. § 1606(g) also supports the view that settlement trusts were not created solely to protect Native land:

> In addition, in recognition of the unique environment in which the Native Corporations operate, the subparagraph authorizes such *stock*, if so provided by the authorizing amendment to the articles of incorporation, to carry certain transfer restrictions or to be canceled upon the death of the original holder, *to be restricted in its issuance* to Natives aged 65 or older similarly identifiable groups of Natives, or *to State-Chartered Settlement Trusts established for the benefit of Natives or descendants of Natives, including identifiable groups thereof.*

Senate Rep. No. 201, 100th Cong., 2d Sess. 24, *reprinted in* 1987 U.S.C.C.A.N. 3269, 3276-77 (emphasis added).

Congress declared that one purpose of the 1987 amendments was "to enable the shareholders of each Native corporation to structure the further implementation of the settlement in light of their particular circumstances and needs." Pub. L. No. 100-241, § 2(5), 101 Stat. 1788 (1988). With respect to settlement trusts, Congress clearly intended to give ANCSA corporations more flexibility in implementing the broad goals of the 1971 act, including alternatives theretofore not generally available to corporations:

> While setting forth Settlement Trust characteristics, *Congress intentionally left discretion in the Native Corporations to formulate and state the terms and conditions governing the Trust* through the trust instrument, consistent with the provisions of this Act and State law. Specifically, the settlor Native corporation shall have the authority to set forth the terms and conditions contained in the trust instrument, *including but not limited to . . . distributions . . .*

133 Cong. Rec. H. 11933 (Dec. 21, 1987), *reprinted in* 1987 U.S.C.C.A.N. 3299, 3308-09 (emphasis added).

The petitioners' interpretation would prevent ANCSA corporations from taking advantage of the increased flexibility available through a settlement trust, giving § 1629e a meaning directly contrary to the purpose of the 1987 amendments.

CONCLUSION

The petitioners have not shown the "compelling reasons" required by United States Supreme Court Rule 10 for a grant of certiorari. Their petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTES, ACT OF FEBRUARY 3, 1988, PUB.L. 100-241, §§ 2, 101 STAT. 1813, 43 U.S.C. §§ 1606(h)(1)(A), 1629b(a), 1629e, Alaska Stat. §§ 10.06.305(b), 10.06.960(f)

Federal Statutes

Congressional Findings and Declaration of Policy for Alaska Native Claims Settlement Act Amendments of 1987

Pub.L. 100-241, § 2, Feb. 3, 1988, 101 Stat. 1788, provided that:

> "The Congress finds and declares that —
>
> "(1) the Alaska Native Claims Settlement Act [this chapter] was enacted in 1971 to achieve a fair and just settlement of all aboriginal land and hunting and fishing claims by Natives and Native groups of Alaska with maximum participation by Natives in decisions affecting their rights and property;
>
> "(2) the settlement enables Natives to participate in the subsequent expansion of Alaska's economy, encouraged efforts to address serious health and welfare problems in Native villages, and sparked a resurgence of interest in the cultural heritage of the Native peoples of Alaska;
>
> "(3) despite these achievements and Congress's desire that the settlement be accomplished rapidly without litigation and

in conformity with the real economic and social needs of natives, the complexity of the land conveyance process and frequent and costly litigation have delayed implementation of the settlement and diminished its value;

"(4) Natives have differing opinions as to whether the Native Corporation, as originally structured by the Alaska Native Claims Settlement Act [this chapter], is well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values;

"(5) to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property, the Alaska Natives Claims Settlement Act [this chapter], must be amended to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs;

"(6) among other things, the shareholders of each Native Corporation must be permitted to decide —

"(A) when restrictions on alienation of stock issued as part of the settlement should be terminated, and

"(B) whether Natives born after December 18, 1971, should participate in the settlement;

"(7) by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not expressing an opinion on the manner in which such shareholders choose to balance individual rights and communal rights;

"(8) no provision of this Act [see Short title of 1988 Amendment note under this section] shall —

"(A) unless specifically provided, constitute a repeal or modification, implied or otherwise, of any provision of the Alaska Native Claims Settlement Act [this chapter]; or

"(B) confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands (including management, or regulation of the taking, of fish and wildlife) or persons in Alaska; and

"(9) the Alaska Native Claims Settlement Act [this chapter] and this Act [see Short Title of 1988 Amendment note under this section] are Indian legislation enacted

by Congress pursuant to its plenary authority under the constitution of the United States to regulate Indian affairs."

43 U.S.C. § 1606. Regional Corporations

(h) Settlement Common Stock

(1) Rights and restrictions

(A) Except as otherwise expressly provided in this chapter, Settlement Common Stock of a Regional Corporation shall —

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

43 U.S.C. § 1629b. Procedures for considering amendments and resolutions

(a) Coverage

Notwithstanding any provision of the articles of

incorporation and bylaws of a Native Corporation or of the laws of the State, except those related to proxy statements and solicitations that are not inconsistent with this section —

> (1) an amendment to the articles of incorporation of a Native Corporation authorized by subsections (g) and (h) of section 1606 of this title, subsection (d)(1)(B) of this section, or section 1629c of this title;
>
> (2) a resolution authorized by section 1629(d)(2) of this title
>
> (3) a resolution to establish a Settlement Trust; or
>
> (4) a resolution to convey all or substantially all of the assets of a Native Corporation to a Settlement Trust pursuant to section 1629e(a)(1) of this title;

shall be considered in accordance with the provisions of this section.

43 U.S.C. § 1629e. Settlement Trust Option

(a) Conveyance of corporate assets.

> (1)(A) A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extent that such laws are inconsistent with this section and section 36 [43 USCS § 1629b]).

(B) The approval of the shareholders of the corporation in the form of a resolution shall be required to convey all or substantially all of the assets of the corporation to a Settlement Trust. A conveyance in violation of this clause shall be void ab initio and shall not be given effect by any court.

(2) No subsurface estate in land shall be conveyed to a Settlement Trust. A conveyance of title to, or any other interest in, subsurface estate in violation of this subparagraph shall be void ab initio and shall not be given effect by any court.

(3) Conveyances made pursuant to this subsection —

(A) shall be subject to applicable laws respecting fraudulent conveyance and creditors rights; and

(B) shall give rise to dissenters rights to the extent provided under the laws of the State only if the rights of beneficiaries in the Settlement Trust receiving a conveyance are inalienable.

(4) The provisions of this subsection shall not prohibit a Native Corporation from engaging in any conveyance, reorganization, or transaction not otherwise prohibited under the laws of the State or the United States.

Appendix A

(b) Authority and limitations of a Settlement Trust.

(1) The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives. A Settlement Trust shall not —

(A) operate as a business;

(B) alienate land or any interest in land received from the settlor Native Corporation (except if the recipient of the land is the settlor corporation); or

(C) discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native Corporation.

An alienation of land or an interest in land in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(2) A Native Corporation that has established a Settlement Trust shall have exclusive authority to —

(A) appoint the trustees of the trust, and

(B) remove the trustees of the trust for cause.

Appendix A

Only a natural person shall be appointed a trustee of a Settlement Trust. An appointment or removal of a trustee in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(3) A Native Corporation that has established a Settlement Trust may expand the class of beneficiaries to include holders of Settlement Common Stock issued after the establishment of the trust without compensation to the original beneficiaries.

(4) A Settlement Trust shall not be held to violate any laws against perpetuities.

(c) Savings.

(1) The provisions of this Act [43 USCS §§ 1601 et seq.] shall continue to apply to any land or interest in land received from the Federal Government pursuant to this Act [43 USCS §§ 1601 et seq.] and later conveyed to a Settlement Trust as if the land or interest in land were still held by the Native Corporation that conveyed the land or interest in land.

(2) No timber resources subject to section 7(i) conveyed to a Settlement Trust shall be sold, exchanged, or otherwise conveyed except as necessary to —

(A) dispose of diseased or dying timber or to prevent the spread of disease or insect infestation;

(B) prevent or suppress fire; or

(C) ensure public safety. The revenue, if any, from such timber harvests shall be subject to section 7(i) as if such conveyance had not occurred.

(3) The conveyance of assets (including stock or beneficial interests) pursuant to subsection (a) shall not affect the applicability or enforcement (including specific performance) of a valid contract, judgment, lien, or other obligation (including an obligation arising under section 7(i)) to which such assets, stock, or beneficial interests were subject immediately prior to such conveyance.

(4) A claim based upon paragraph (1), (2), or (3) shall be enforceable against the transferee Settlement Trust holding the land, interest in land, or other assets (including stock or beneficial interests) in question to the same extent as such claim would have been enforceable against the transferor Native Corporation, and valid obligations arising under section 7(i) as well as claims with respect to a conveyance in violation of a valid contract, judgment, lien, or other

obligation shall also be enforceable against the transferor corporation.

(5) Except as provided in paragraphs (1), (2), (3), and (4), once a Native Corporation has made, pursuant to subsection (a), a conveyance to a Settlement Trust that does not —

(A) render it —

(i) unable to satisfy claims based upon paragraph (1), (2), or (3); or

(ii) insolvent; or

(B) occur when the Native Corporation is insolvent; the assets so conveyed to the Settlement Trust shall not be subject to attachment, distraint, or sale on execution of judgment or other process or order of any court, except with respect to the lawful debts or obligations of the Settlement Trust.

(6) No transferee Settlement Trust shall make a distribution or conveyance of assets (including cash, stock, or beneficial interests) that would render it unable to satisfy a claim made pursuant to paragraph (1), (2), or (3). A distribution or conveyance made in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(7) Except where otherwise expressly provided, no provision of this section shall be construed to require shareholder approval of an action where shareholder approval would not be required under the laws of the State.

Alaska Statutes

Alaska Stat. § 10.006.305(b)

(b) All shares of a class shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions, unless the class is divided into series. If a class is divided into series, all the shares of a series shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions.

Alaska Stat. § 10.06.960(f)

Notwithstanding the other provisions of this chapter, a corporation organized under the act is governed by the act to the extent the act is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by the act, and the action is considered to be approved and adopted if approved under the act. An amendment approved under the act and delivered to the commissioner under AS 10.06.512 shall be filed by the commissioner under AS 10.06.910, and a certificate of amendment shall be issued.

APPENDIX B — VERIFIED NOTICE OF REMOVAL FILED OCTOBER 28, 1992 WITH ATTACHED SUMMONS AND COMPLAINT

E. Budd Simpson
BIRCH, HORTON, BITTNER & CHEROT
One Sealaska Plaza, Suite 301
Juneau, Alaska 99801
(907) 586-2890

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. K92-006 CIV

LAURIE ISAAC BROAD,

For Himself and All Others Who Are Similarly Situated,

Plaintiffs,

vs.

SEALASKA CORPORATION, THE SEALASKA ELDERS' SETTLEMENT TRUST, and Patrick Anderson, Charles Carlson, Joseph Demmert, Jr., L. Embert Demmert, Raymond Demmert, Jim Edenso, Clarence Jackson, Sr., Marlene A. Johnson, Albert Kookesh, Ethel Lund, Carlton Smith, Richard Stitt, Sr., Ralph Strong, Alan Williams, Rosita Worl, and Marjorie Young (Corporate Directors),

Defendants.

Appendix B

VERIFIED NOTICE OF REMOVAL

The Defendants respectfully submit this Verified Notice of Removal pursuant to 28 U.S.C. §§ 1441(a) and (b) and 1331. This case presents issues under federal law for which the district courts of the United States have original jurisdiction.

I. BACKGROUND

1. On September 30, 1992, plaintiff filed a Complaint in the Superior Court for the State of Alaska, First Judicial District of Petersburg. The complaint was docketed by the Clerk of the Superior Court, assigned Case No. 1PE-92-132CI, and is now pending therein. A true and correct copy of the summons and complaint is attached hereto as required by 28 U.S.C. § 1446(a).

2. The state court action arises under the Alaska Native Claims Settlement Act ("ANCSA"), codified at 43 U.S.C. §§ 1601-1629e (1992), and Alaska Rule of Civil Procedure 23. Specifically, plaintiff alleges that the Sealaska Elders' Settlement Trust, established by Sealaska Corporation under 43 U.S.C. § 1629e, unfairly discriminates against those Sealaska shareholders who have not received benefits under the Trust. Complaint at ¶ 7. Plaintiff seeks, *inter alia*, a declaration that the Trust is discriminatory. Complaint at ¶ B.

3. On or around October 2, 1992, the summons and complaint were served on defendant Sealaska Corporation. Accordingly, this notice is filed within 30 days of receipt by defendant Sealaska Corporation of service.

4. No proceedings have been held in the state court action except the *pro forma* issuance of a case number with the filing of the complaint.

5. The Defendants seek removal of the state court action to the United States District Court of Alaska.

II. THE DISTRICT COURT HAS ORIGINAL JURISDICTION OVER THE STATE COURT ACTION

6. The district court has original jurisdiction over this state court action, and the action is removable pursuant to 28 U.S.C. §§ 1441(a) and (b).

7. Original jurisdiction exists because the action arises under the laws of the United States. *See* 28 U.S.C. § 1331. Plaintiff's claim for relief arises under federal law: 43 U.S.C. § 1629e(b).

CONCLUSION

WHEREFORE, the Defendants ask that the state court action be removed from the Superior Court for the State of Alaska, First Judicial District at Petersburg to the United States District Court of Alaska.

DATED this 27 day of October, 1992.

BIRCH, HORTON, BITTNER & CHEROT
Attorneys for the Defendants

By: s/ E. Budd Simpson
E. Budd Simpson

Appendix B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT PETERSBURG

Case No. 1PE-92-132CI

LAURIE ISAAC BROAD

For Himself and All Others Who Are Similarly Situated

Plaintiffs

vs.

SEALASKA CORPORATION, THE SEALASKA ELDER'S SETTLEMENT TRUST, and Patrick Anderson, Charles Carlson, Joseph Demmert, Jr., L. Embert Demmert, Raymond Demmert, Jim Edenso, Clarence Jackson, Sr., Marlene A. Johnson, Albert Kookesh, Ethel Lund, Carlton Smith, Richard Stitt, Sr., Ralph Strong, Alan Williams, Rosita Worl, and Marjorie Young (Corporate Directors)

Defendants

SUMMONS

To: SEALASKA CORPORATION

c/o Registered Agent
Birch, Horton, Bittner & Monroe
One Sealaska Plaza
Juneau, Alaska 99801

You are hereby summoned and required to serve upon:

Appendix B

Fred W. Triem
Box 129
Petersburg, Alaska 99833
(907) 772-3911

an answer to the Complaint which is herewith served upon you; and you must do so within twenty (20) days after the service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

s/ Darlene A. Whitethorn
Darlene A. Whitethorn
Magistrate

Petersburg, Alaska

ATTACHMENT: Complaint for Class Action of 30 September 1992

Appendix B

[Stamped]
Filed in Trial Courts
State of Alaska, First District
at Petersburg

SEP 30 1992

By s/ dw

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT PETERSBURG

Case No. 1PE-92-132CI

LAURIE ISAAC BROAD

For Himself and All Others Who Are Similarly Situated

Plaintiffs

vs.

SEALASKA CORPORATION, SEALASKA ELDER'S SETTLEMENT TRUST, and Patrick Anderson, Charles Carlson, Joseph Demmert, Jr., L. Embert Demmert, Raymond Demmert, Jim Edenso, Clarence Jackson, Sr., Marlene A. Johnson, Albert Kookesh, Ethel Lund, Carlton Smith, Richard Stitt, Sr., Ralph Strong, Alan Williams, Rosita Worl, and Marjorie Young

Defendants

COMPLAINT FOR CLASS ACTION

Comes now into court Laurie Isaac Broad, for himself and

for all other members of the class hereinafter described, who are plaintiffs in the above-captioned cause, by and through his attorney, Fred W. Triem, of Box 129, Petersburg, Alaska, and proceeding according to Alaska Civil Rule 23, and for their cause of action allege and aver as follows:

(1) Plaintiff is a resident of the State of Alaska and is domiciled in Wrangell, Alaska.

(2) Defendants are Sealaska Corporation, the Sealaska Elders' Settlement Trust, and the Board of Directors of Sealaska. Sealaska Corporation is an Alaska corporation organized under Section 7 of the Alaska Native Claims Settlement Act [43 U.S.C. § 1606] as a Regional Corporation, having its principal office in the City of Juneau, Alaska, within the First Judicial District, for the purpose of securing and administering the benefits of the Settlement Act for its shareholders.

(3) This action is brought by plaintiff as a class action, on his own behalf and on the behalf of all others similarly situated, under the provisions of Alaska Civil Rule 23 for injunctive and declaratory relief, for restitution, for damages, and for relief incident and subordinate thereto, including pre-judgment interest, costs and attorneys' fees.

(4) The Class so represented by the plaintiff in this action and of which plaintiff is himself a member, consists of all shareholders of Sealaska Corporation who have not been enrolled as beneficiaries in the Elders' Settlement Trust [hereinafter "EST"] during the period from November 1991 to present or who have not been paid the special dividend.

(5) The exact number of members of the Class, as identified

and described hereinabove, is not known; but it is estimated that there are approximately 14,000 members. The Class is so numerous that joinder of individual members herein is impracticable.

(6) There is a common question of fact and law in the action that relates to and affects the rights of each member of the Class.

(7) The claims advanced and the relief sought are common to the entire Class, namely, on or about November 1991, Sealaska Corporation established the Sealaska Elders' Settlement Trust [hereinafter: EST]. The EST confers a special benefit upon certain privileged shareholders in the form of an extra dividend of $20 per share paid for by the corporation. This benefit is conferred upon only those shareholders who are of the age of 65 years or older. Because the named plaintiff is not yet of the age of 65 years, he can receive nothing from the EST — even though he holds the same class of stock as other shareholders who do receive this extraordinary benefit. The EST unfairly discriminates against the named plaintiff and the Class because it is supported and paid for by an expenditure of corporate assets that would otherwise be available for *pro rata* distribution to *all* the shareholders of the corporation including the plaintiffs. Therefore, the benefits of the EST are a constructive dividend, the restricted and limited distribution of which discriminates against those shareholders of the same class of stock who do not receive this dividend.

(8) The claim of the plaintiff, who is a representative of the Class herein, is typical of the claims of the Class, in that the claims of all members of the Class, including the claim of the plaintiff, depend on the showing of the acts of omissions of the defendants giving rise to the right of the plaintiffs to the relief sought herein.

(9) The named plaintiff is the representative party for the Class, and is able to, and will, fairly and adequately protect the interests of the Class. The plaintiff's attorney has sufficient experience and knowledge to conduct this litigation on behalf of the plaintiff and the putative Class.

(10) There is no conflict between the nominal plaintiff and the other members of the Class with respect to this action or with respect to the claims for relief herein set forth.

WHEREFORE the plaintiff prays, for himself and for all other members of the Class, the following relief:

(A) That the court determine this action is properly maintained as a Class action pursuant to Civil Rule 23; and

(B) That the court declare the benefits of the EST to be a constructive dividend, the past and present distribution of which discriminates against the members of the Class; and

(C) That the court enjoin the defendants from continuing the Elders' Settlement Trust; or

(D) That the court enjoin the defendants to enroll the plaintiffs in the EST; and

(E) That the court enjoin the defendants from paying any dividend and from making any distribution to any shareholder who is not a member of the Class until all members of the Class have been fully compensated for their claims herein; and

(F) That the court award restitution and damages to the plaintiff and to the Class for their *pro rata* share of the corporate assets that have been expended on the EST; and

(G) That the court award pre-judgment interest to the plaintiff and to The Class; and

(H) That the defendant be required to pay the plaintiff's court costs and attorney's fees that are incurred in this action, and post-judgment interest; and

(I) That the court award such further and additional relief as may seem to the court just and proper under the circumstances, including costs and expenses.

Respectfully submitted this 30th day of September 1992 at Petersburg, Alaska.

s/ Fred W. Triem
Fred W. Triem
Attorney for plaintiffs

APPENDIX C — AMENDED COMPLAINT FILED OCTOBER 30, 1992

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA, FIRST JUDICIAL DISTRICT AT PETERSBURG

Case No. 1PE-92-132CI

LAURIE ISAAC BROAD, MARSHA SIMONDS, JULIE WIGG, JOYCE LEWIS, CLINTON LEWIS, LARRY TAYLOR, JR., MARC SIMPSON, REBECCA SIMPSON, ALORA J. WINCHESTER, EMILY GOTARDO, BARBARA CRABTREE, ANGIE DOAK, ROYANN CHURCHILL, LEONARD VALEZQUEZ, ARLENE BELL HANSON and VICTOR CARL DAVIS, JR.

For themselves and All Others Who Are Similarly Situated

Plaintiffs

vs.

SEALASKA CORPORATION, SEALASKA ELDER'S SETTLEMENT TRUST, and Patrick Anderson, Charles Carlson, Joseph Demmert, Jr., L. Embert Demmert, Raymond Demmert, Jim Edenso, Clarence Jackson, Sr., Marlene A. Johnson, Sr., Albert Kookesh, Ethel Lund, Carlton Smith, Richard Stitt, Sr., Ralph Strong, Alan Williams, Rosita Worl, and Marjorie Young (DIRECTORS)

Defendants

Appendix C

AMENDED COMPLAINT FOR CLASS ACTION

Come now into court Laurie Isaac Broad and his co-plaintiffs, for themselves and for all other members of the Class hereinafter described, who are the plaintiffs in the above-captioned cause, by and through their attorney, Fred W. Triem, of Box 129, Petersburg, Alaska, proceeding according to Alaska Civil Rule 23, and for their cause of action allege and aver as follows:

(1) Plaintiffs are residents of the State of Alaska and are domiciled in Petersburg or in Wrangell, Alaska.

(2) All of the plaintiffs named above are shareholders of Sealaska Corporation.

(3) Defendants are Sealaska Corporation, the Sealaska Elder's Settlement Trust, and the individual members of the Board of Directors of Sealaska Corporation (some of whom are also trustees of the Sealaska Elders' Settlement Trust).

(4) Sealaska Corporation is an Alaska corporation organized under Section 7 of the Alaska Native Claims Settlement Act [43 U.S.C. §1606] as a Regional Corporation, having its principal office in Juneau, Alaska, within the First Judicial District, for the purpose of securing the administering the benefits of the Settlement Act for its shareholders.

(5) The Sealaska Elders' Settlement Trust is a trust established by, funded by, and registered by Sealaska Corporation on 10 December 1991 pursuant to AS 13.16.005-.300 in Case No. 1JU-91-11TR in the Superior Court in Juneau, Alaska.

Appendix C

(6) This action is brought by the plaintiffs as a class action, on their own behalf and on the behalf of all others similarly situated, under the provisions of Alaska Civil Rule 23 for injunctive and declaratory relief, for restitution, for damages, and for relief incident and subordinate thereto, including pre-judgment interest, costs, and attorneys' fees.

(7) The Class so represented by the plaintiffs in this action and of which plaintiffs are themselves members, consists of all shareholders of Sealaska Corporation who have not been enrolled as beneficiaries in the Elders' Settlement Trust [hereinafter "EST"] during the period from November 1991 to present or who have not been paid the special dividend of $20 per share that has been and is being distributed only to those shareholders who are the beneficiaries of the EST.

(8) The exact number of members of the Class, as identified and described hereinabove, is not known; but it is estimated that there are approximately 14,465 members in the Class. The Class is so numerous that joinder of individual members herein is impracticable.

(9) There is a common question of fact and law in the action that relates to and affects the rights of each member of the Class.

(10) The claims being made by the plaintiffs are typical of the claims of the Class. (In fact, the claims of the plaintiffs are *identical* with those of the Class).

(11) The representative parties, who are the nominal plaintiffs herein, are adequate to represent the Class and do not have any conflicts with the other members of the Class with

respect to this action or with respect to the claims for relief herein set forth. The named plaintiffs are the representative party for the Class, and are about to, and will, fairly and adequately protect the interests of the Class. The plaintiffs' attorney has sufficient experience and knowledge to conduct this litigation on behalf of the plaintiffs and the putative Class.

(12) The claims advanced and the relief sought are common to the entire Class, namely: on or about December 1991, Sealaska Corporation established the Sealaska Elders' Settlement Trust [hereinafter: EST]. The EST confers a special benefit upon certain privileged shareholders in the form of an extra dividend or distribution of $20 per share paid for by the corporation. This benefit is conferred upon only those shareholders who are of the age of 65 years or older. Because the named plaintiffs are not yet of the age of 65 years, they can receive nothing from the EST — even though they hold the same class of stock as the other shareholders who do receive this extraordinary distribution. The EST unfairly discriminates against the named plaintiffs and against the Class because it is supported and paid for by an expenditure of corporate assets that would otherwise be available for *pro rata* distribution to *all* the shareholders of the corporation including the plaintiffs and the members of the Class. Therefore, the benefits of the EST are a constructive dividend, the restricted and limited distribution of which discriminates against those shareholders of the same class of stock who do not receive this dividend.

WHEREFORE the plaintiffs pray, for themselves and for all the other members of the Class, the following relief:

(A) That the court determine this action to be properly maintained as a Class action pursuant to Civil Rule 23; and

(B) That the court declare the benefits of the EST to be a constructive dividend, the past and present distribution of which discriminates against the members of the Class; and

(C) That the court enjoin the defendants from continuing the Elders' Settlement Trust; or

(D) That the court enjoin the defendants to enroll the plaintiffs and the members of the Class in the EST; and

(E) That the court enjoin the defendants from paying any dividend and from making any distribution to any shareholder who is not a member of the Class until all members of the Class have been fully compensated for their claims herein; and

(F) That the court award restitution and damages to the plaintiff and to the Class for their *pro rata* share of the corporate assets that have been expended on the EST; and

(G) That the court award pre-judgment interest to the plaintiffs and to The Class; and

(H) That the defendant be required to pay the plaintiffs' court costs and attorney's fees that are incurred in this action, and post-judgment interest; and

(I) That the court award such further and additional relief as may seem to the court just and proper under the circumstances, including costs and expenses.

Respectfully submitted this 30th day of October 1992 at Petersburg, Alaska.

Appendix C

s/ Fred W. Triem
Fred W. Triem
Attorney for plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of October in 1992, I mailed a true and correct copy of the foregoing pleading to Leslie Longenbaugh, Esq., attorney for the defendants, Sealaska Corporation, et. al.

s/ Fred W. Triem
Fred W. Triem

FILED
JAN 14 1997
CLERK

No. 96-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LAURIE ISAAC BROAD, et al.,
for himself and all others who are similarly situated,

Petitioners,

v.

SEALASKA CORPORATION,
SEALASKA ELDERS' SETTLEMENT TRUST, et al.,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

Fred W. Triem
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Box 129
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Counsel of Record
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6 pp

PETITIONERS' ARGUMENTS IN REPLY

I. Although the ANCSA statute applies only in Alaska, the preemption issues are of nation-wide importance.

Sealaska argues that the issues presented here are of only limited importance and cannot arise outside of the Ninth Circuit. Brief in Opposition at pgs. 10-11. Respondent is not correct. This case presents issues that frequently are encountered in federal courts throughout the country: *First*, whether a court should fashion its preemption decisions on the narrowest grounds possible. *Second*, whether a court should find an implied preemption when the federal statute being construed contains an explicit preemption elsewhere in the same text. *Third*, whether a court should resort to a negative pregnant in deciding that the statutory prohibition against one form of discrimination amounts to a statutory authorization for any other form of discrimination.

The importance of the implied preemption issue can be gleaned from considering how frequently it arises in the reported decisions of the courts of appeals. Consider these numbers from a recent search on the Westlaw data base for federal courts of appeals (F.3d only):

Number of implied preemption decisions reported in the F.3d reporter

January 1996 through October 1996	13
August 1993 through October 1996	55

The importance of preemption doctrine, and preemption's effect on the removal jurisdiction can be seen in the commentaries that have appeared in the academic journals. *See, e.g.*, Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORN.L.REV. 767 (1994); Stanley Blumenfeld, *Artful Pleading and Removal Jurisdiction: Ferreting Out the True Nature of a Claim*, 35 UCLA L.REV. 315, 330-40 (1987); Richard E. Levy, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634 (1984).

II. The preemption removal was improper.

(A) The cause of action for an illegal dividend is grounded in state law—the common law of Alaska:

The common law of Alaska has developed a rule that prohibits a corporation from making a discriminatory dividend, that prohibits a dividend that is not paid on a uniform and pro rata basis to all shares of the same class of stock. *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 277 (Alaska 1981)("the excluded shareholder must participate equally in the payments received by other shareholders"). This is a widely recognized judge-made rule of corporate law. *See, e.g.*, FLETCHER, 11 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5352 (1995 rev'd. vol.).

(1) This is a subject that is completely within the control of state law rules (the federal law actually says so): There is no federal law that addresses equality in corporate dividends. Instead, federal law refers us to the controlling state law of corporations. 43 U.S.C. § 1606(h)(1)(A) specifically adopts Alaska law to regulate the affairs of ANCSA corporations:

> Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall —
>
> . . . .
>
> (iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

The same explicit deference to state law is found in ANCSA § 39, 43 U.S.C. § 1629e(a)(1)(A) ("in accordance with the laws of the State"). There are four (4) such references to "the laws of the State" in 43 U.S.C. § 1629e. This is the statute upon which Sealaska relies as authority for its corporate discrimination, and is the statute which the Ninth Circuit held "implicitly preempts state law," *Broad v. Sealaska*, 85 F.3d 422, 426 (9th Cir. 1996).

(2) The Elders' Settlement Trust was established under Alaska law: The discriminatory dividend was paid from a trust that Sealaska Corporation established under the authority and control of Alaska law. Alaska Statutes, §§ 13.36.010 - .300 (administration and registration of a trust). This is the only statute that Broad relied upon to state plaintiffs' cause of action (and then only in the amended complaint). Amended Complaint for Class Action, at ¶ 5 (appears in Respondent's Brief in Opposition, Appendix C, pg. 23a).

In its answer, *Sealaska admitted that its trust was established under this Alaska statute*: "Defendants admit the allegations contained in paragraph 5 of the amended complaint, and further state that defendant Sealaska Corporation established the Sealaska Elders' Settlement Trust pursuant to 43 U.S.C. §§ 1629b and 1629e (1987)."

Sealaska's Answer and Affirmative Defenses, at ¶ 5, 13 November 1992, filed at docket # 5.

(3) So it was Sealaska that first introduced the federal statute, doing so in its answer: It first appeared in Sealaska's answer, and also in its notice of removal (appears in Respondent's Appendix B, pg. 13a).

(B) Sealaska's preemption removal is prohibited by the decisions of this court:

(1) Sealaska's removal does not pass the Gully test (a federal question must be obvious on the face of the well-pleaded complaint; plaintiff is master of his cause): Justice Cardozo explained that the federal question "must be an element, and an essential one, of the plaintiff's cause of action . . . and . . . must be disclosed *upon the face of the complaint unaided by the answer or by the petition for removal . . . .*" *Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936) (emphasis added).

(2) Sealaska's removal does not pass the Skelly Oil test (a federal question in the defense is not enough to support removal): Justice Frankfurter explained that the federal question could not be "injected into the case only in anticipation of a defense" because the underlying contract claim was one that arose under state law. *Skelly Oil Co. v. Phillips, Petroleum Co.*, 339 U.S. 667, 672 (1950). Here, this contract between Sealaska Corporation and its shareholders is governed by Alaska law, that of the state of incorporation. *See also Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 12, 103 S.Ct. 2841, 2847-48, 77 L.Ed.2d 420, 432 (1983)(same rule, quoting *Gully*).

(3) Sealaska's removal does not pass the Caterpillar test (only a "complete preemption" is enough to allow removal): Justice Brennan explained that there is an "independent corollary" to the well pleaded complaint rule, known as the "complete pre-emption" doctrine. It allows removal only if the preemptive force of a federal statute is so "extraordinary" that it converts a state common-law claim into a federal claim (and thus allows preemption removal). *Caterpillar Tractor v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318, 327 (1987). These situations are rare. *Strong v. Telectronics Pacing Systems, Inc.* 78 F.3d 256, 259 (6th Cir. 1996) (removal was improper because "complete preemption doctrine" applies in only two situations in which Congress has expressed the intent that federal law completely displaces state law: in § 301 of the Labor Management Relations Act and in § 502 of ERISA).

CONCLUSION

This Petition for Certiorari should be granted *or* in the alternative, the Ninth Circuit's decision should be vacated with instructions for dismissal in federal court accompanied by remand to the courts of the State of Alaska. Supreme Court Rule 16.1.

Respectfully submitted this 4th day of January in 1997 at Petersburg, Alaska.

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